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NO. 75-1661

In The

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

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VALLEY MOLD COMPANY, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

---

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit dated February 17, 1976.

## OPINIONS BELOW

The backpay proceedings of the National Labor Relations Board which are the subject of this Application resulted from a reversal by the Board of its trial examiner's decision in favor of Petitioner on unfair labor practice charges. The Board's decision, officially reported at 191 NLRB 498 (1971), was affirmed by the Sixth Circuit Court of Appeals in a decision officially reported at 467 F. 2d 482 (1972).

This application for certiorai relates to the supplemental backpay proceedings initiated by the Board for the purpose of determining entitlement to backpay of certain of the employees involved in the Unfair Labor Practice case. The Supplemental Decision and Order of the Board, officially reported at 215 NLRB No. 38 (1974) is printed in Appendix A, *infra*. The opinion of the Court of Appeals is printed in Appendix B, *infra*, and is reported officially at 529 F. 2d ——, 91 LRRM 2479; 78 L.C. ¶ 11,259 (6th Cir., 1976).

## JURISDICTION

The judgment of the Court of Appeals was entered on February 17, 1976. Petitioner invokes the jurisdiction of this Court under Section 1254 (1) of the Judicial Code, 28 U.S.C. Section 1254 (1). Jurisdiction of the Court of Appeals was based upon the Board application for enforcement of its supplemental order pursuant to Section 10 (e) of the National Labor Relations Act, 29 U.S.C. Section 160 (e).

## QUESTIONS PRESENTED

(I) Whether there is a conflict of authority in the various United States Courts of Appeals with respect to whether Section 10 (b) of the National Labor Relations Act, 29 U.S.C. Section 160 (b), requires the Board to provide for pre-hearing discovery in its administrative proceedings as far as practicable.

(II) Whether there is a conflict of authority in the various United States Court of Appeals with respect to whether Section 102.30 (a) of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended, 29 C.F.R. 102.30 (a), is properly interpreted as meaning that



depositions may be taken prior to a Board hearing only if there is reason to believe that the witness whose deposition is sought may be unavailable to testify at the hearing.

(III) Whether a respondent employer in NLRB backpay proceedings is denied a meaningful hearing and the effective assistance of counsel in preparing a defense to the alleged backpay entitlement when the respondent employer has the burden of proving that a backpay claimant incurred willful loss of earnings, but the respondent employer is denied any effective means either of discovering in advance of the hearing what factual allegations, within the exclusive knowledge of the claimant, will be made at the hearing concerning the claimant's unsuccessful diligent efforts to procure suitable interim employment or of preparing a defense thereto.

## STATUTES INVOLVED

National Labor Relations Act, as amended, Section 10 (b), 29 U.S.C. Section 160 (b).

Section 102.30 (a) of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended, 29 C.F.R. 102.30 (a).

The complete text of these statutes, the interpretation of which is central to the questions presented for review, and of all other statutes cited herein are at Appendix "C" hereof.

## STATEMENT OF THE CASE

### I. HISTORY OF THE CASE

Petitioner is engaged in the manufacture of plastic products and the design of injection molding tools. The plastic products are produced at a plant in Englewood,

Ohio. The Englewood plant provides jobs for 34 full-time employees.

The backpay proceedings which gave rise to the issues presented herein resulted from previous litigation regarding certain unfair labor practices found to have been committed by Petitioner during the months of June through August, 1970. At an unfair labor practice hearing held in November, 1970, the Board's trial examiner found that, of the discharged employees, 4 of the employees were discharged for refusing to sign a confidentiality agreement and not because of union activity and that 17 of Petitioner's employees were laid off for the purpose of bona fide machinery repairs rather than because of union activity

Substituting its opinion of the credibility of the witnesses and relative weight to be accorded their testimony for that of its Trial Examiner before whom the witnesses testified, the National Labor Relations Board reversed the Trial Examiner on these issues. The Board's Decision was affirmed by the Sixth Circuit Court of Appeals.

## II. THE BACKPAY SPECIFICATION

In December, 1973 Petitioner received from the Board's Acting Regional Director a "Back Pay Specification and Notice of Hearing" containing twenty-five (25) separate claims of backpay entitlement with regard to nineteen (19) different individuals. [A. 182-194][1] The total backpay, with interest, claimed to be owed by the small, locally-owned and staffed business was approximately $47,000. Of this amount, approximately $42,000 was claimed by three (3) factory workers who had allegedly been unable

[1] "A" references are to the pages of the printed Appendix submitted to the Sixth Circuit.



to secure suitable interim employment despite alleged diligent effort to do so in order to mitigate their damages for periods ranging from 1¾ to 2½ years.

The specification contained the National Labor Relations Board's computation of net backpay due based upon its calculations of gross backpay due reduced by its information concerning what interim employment claimants had succeeded in obtaining. The Specification contained not one word about what information, if any, was discovered by the National Labor Relations Board investigation with regard to efforts by the claimants to obtain suitable interim employment during those portions of the backpay period in which claimants were not employed.

Petitioner's Answer to the backpay specification [A. 196-200] expressly indicated, with regard to each backpay claimant, "Respondent is without knowledge or information sufficient to form a belief as to . . . the extent to which the amounts claimed represent other than a willful failure to minimize loss of earnings." Petitioner's Answer concluded by stating, "Respondent intends to examine a substantial number of employees in question by means of deposition . . . as a means of determining the extent to which said employees made diligent, timely and appropriate effort to mitigate loss of earnings."

## III. MOTION FOR THE TAKING OF DEPOSITIONS

Seven days after filing its Answer, Petitioner sent to the Regional Director an "Application for the Taking of Depositions" [A. 206-207] of eight (8) of the backpay claimants which recited, in pertinent part, that:

> "The taking of depositions is necessary in this matter in order that VALLEY MOLD COMPANY, INC. may

> determine the extent to which the employees sought to be deposed have made diligent, timely and appropriate effort to mitigate loss of earnings . . .
>
> The persons sought to be deposed are expected to testify with regard to what, if any, efforts were made to seek and procure interim employment within a reasonable time after discharge."

The Regional Director's response was an "Order Denying Application to Take Depositions" [A. 204-205]. The order set forth the standard Board position, maintained throughout this litigation, that the inability of a witness to appear at a hearing is the *only* circumstance under which a regional director or trial examiner is authorized or required to find that there exists "good cause shown" for an application for the taking of pre-hearing depositions submitted in accordance with Rule 102.30(a) of the Board's Rules and Regulations.

Petitioner then submitted to the Regional Director its "Objections of Employer to Order Denying Application to Take Depositions" [A. 208], which contained the following statement:

> "VALLEY MOLD COMPANY, INC. says that, as indicated in its Application, said depositions constitute the only effective means by which it could conduct independent investigation prior to hearing of the extent to which the persons sought to be deposed had made that reasonable effort to seek and procure interim employment within a reasonable time after discharge required as a condition precedent to recovery of back pay.
>
> As the action of the Acting Regional Director in denying the Application effectively eliminated the ability of VALLEY MOLD COMPANY, INC. to defend with regard to this critical issue, said action constitutes such a denial of the fair hearing required by due process . . . as to constitute a Manifest Abuse of the Discretion vested in the Acting Regional Director by Section 102.30 of the Board's Rules and Regulations, Series 8, as amended."



The NLRB General Counsel having filed his "Response" to Petitioner's objections to the ruling [A. 209-210], the Regional Director issued an "Order Referring Respondent's Objections and General Counsel's Opposition to Taking Depositions to the Administrative Law Judge" [A. 211].

## IV. THE BACKPAY HEARING

At the start of the hearing, counsel formally objected to the proceeding going forward prior to giving Petitioner an opportunity to take the depositions requested and reiterated the belief that the circumstances were such as to result in a denial of due process of law. Noting that Petitioner's objection to the proceedings was preserved for the record, the Administrative Law Judge sustained the position taken by the Board's Regional Director [A. 70-71].

Upon cross-examination by Petitioner at the hearing, those eight backpay claimants whom Petitioner had sought to depose testified to making unsuccessful attempts to obtain employment at twenty-nine (29) different businesses. Twenty (20) of the twenty-nine (29) businesses were named by the three backpay claimants whose claims equal 89% of the $47,000.00 total award.

After the General Counsel had rested his case-in-chief, Petitioner moved that the Administrative Law Judge grant a continuance with permission to depose those employers and named individuals alleged to have knowledge bearing upon claimants' attempts to secure suitable interim employment. [A. 174-178] Petitioner's motion having been

denied by the Administrative Law Judge, Petitioner declined to go forward on the ground that, under the circumstances, Petitioner had been denied access to the information concerning claimants' alleged unsuccessful mitigation efforts vital to determining whether claimants' willful loss of earnings constituted an affirmative defense for Petitioner to the backpay claims.

After Petitioner had filed its post-hearing brief directed to, *inter alia,* the constitutional aspect of the procedural issue, the Administrative Law Judge offered to reopen the hearing under limited conditions not including the taking of depositions. Petitioner acquiesced, under protest, to the reopening of the hearing on the terms imposed by the Administrative Law Judge, hired a private investigator, and reported his preliminary findings to the Judge; however, the Administrative Law Judge summarily revoked the reopening of the hearing and closed the record in response to Petitioner's attempt to seek injunctive relief from a Federal District Court with regard to the conditions imposed on the reopened hearing. The closing of the record having created the administrative remedy of Board review, the Federal Injunction action was dismissed.

Relying upon the interpretation of Section 10 (b) of the National Labor Relations Act and Section 102.30 (a) of the Board's Rules and Regulations reached by the Second Circuit Court of Appeals in *N.L.R.B.* v. *Interboro Contractors, Inc.,* 432 F. 2d 854 (2d Cir., 1970), *cert. denied,* 402 U.S. 915 (1971), and finding no merit in Petitioner's insistence that it has been denied a meaningful hearing, both the Board and the Sixth Circuit Court of Appeals held against Petitioner. The Sixth Circuit Court of Appeals had jurisdiction of the case by reason of the Board's application for enforcement of its Supplemental Decision and Order under 29 U.S.C. 160 (e).



## REASONS FOR GRANTING THE WRIT

### I.

**The decision of the Court of Appeals below is in conflict with the decision of the Fifth Circuit Court of Appeals with respect to whether Section 10(b) of the National Labor Relations Act, 29 U.S.C. Section 160 (b), requires the Board to provide for pre-hearing discovery in its administrative proceedings as far as practicable.**

Section 10 (b) of the National Labor Relations Act, 29 U.S.C. 160 (b), provides that unfair labor practice hearings:

> "[S]hall, so far as practicable, be conducted in accordance with the rules of evidence applicable to the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States. . . ."[2]

One of the bases for the Sixth Circuit's decision on the due process issue in the instant case is its conclusion that Section 10 (b) of the Act does not indicate a congressional intent that the Board should permit pre-hearing discovery "so far as practicable." [See Appendix B, p. 32a] The Second Circuit and the Ninth Circuit have similarly held that there is no specific provision in the Act for discovery procedures. *N.L.R.B.* v. *Interboro Contractors, Inc.,* 432 F. 2d 854, 857-858 (2d Cir., 1970), *cert. denied,* 402 U.S. 915 (1971); *N.L.R.B.* v. *Globe Wireless,* 193 F. 2d 748, 751 (9th Cir., 1951).

In irreconcilable conflict with the foregoing decisions, the Fifth Circuit has expressly held a trial examiner's ruling

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[2] The complete texts of all statutes involved herein are at Appendix "C" hereof.

that the National Labor Relations Act does not contain any provision for pretrial discovery to be error on the ground that "Section 10 (b) of the Act would appear to give a trial examiner authority to permit the taking of depositions in any case where such a procedure would be practical." *N.L.R.B.* v. *Safeway Steel Scaffolds, Inc.*, 383 F. 2d 273, 277 (5th Cir., 1967); *accord*, citing and quoting *Safeway, N.L.R.B.* v. *Miami Coca-Cola Bottling Co.*, 403 F. 2d 994, 996 (5th Cir., 1968).

## II.

**The decision of the Court of Appeals below is in conflict with the decision of the Fifth Circuit Court of Appeals with respect to whether Section 102.30(a) of the Board's Rules and Regulations is properly interpreted as meaning that depositions may be taken prior to a Board hearing only if there is reason to believe that the witness whose deposition is sought may be unavailable to testify at the hearing.**

Section 102.30 (a) of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended, 29 C.F.R. 102.30 (a), provides, in pertinent part:

> "Witnesses shall be examined orally under oath, except that for good cause shown after the issuance of a complaint, testimony may be taken by deposition.
>
> (a) . . . The regional director or the administrative law judge, as the case may be, shall upon receipt of the application, if in his discretion good cause has been shown, serve upon the parties an order [granting the application]."

Throughout the litigation below, Petitioner argued that its desire to discover, in advance of the backpay hearing,



the backpay claimants' contentions concerning their alleged unsuccessful efforts to obtain suitable interim employment constitutes exceptionally "good cause shown" for the application to take depositions, since Petitioner would have the burden of disproving such contentions at the hearing and it is impossible to investigate the truth or falsity of factual contentions within the exclusive knowledge and control of a party opponent when such information is first disclosed during the hearing itself. In spite of the constitutional implications of such a holding, discussed in Section III hereof, the Board and the Court of Appeals did not agree. The Supplemental Decision and Order adopted by the Board[3] and the Court of Appeals' decision enforcing same[4] were both heavily influenced by a decision of the Second Circuit Court of Appeals holding that the phrase "for good cause shown" in Section 102.30 (a) means only "when witnesses are unavailable to appear at a hearing":

> The Board contends that its Rule 102.30 permitting depositions for "good cause shown" means that depositions may be taken for use as evidence in an action when there is reason to believe that the witness whose deposition is sought may be unavailable at the hearing, and that the Rule was never intended to provide for the taking of depositions solely for discovery purposes when the witnesses will be available for trial We agree. *N.L.R.B.* v. *Interboro Contractors, Inc.*, 432 F. 2d 854, 857 (2d Cir., 1970), *cert. denied*, 402 U.S. 915 (1971).

The Fifth Circuit Court of Appeals has held that such a conclusion with regard to the scope of "good cause"

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[3] *See* Appendix "A" hereof at page 6a and page 10a and footnotes 8, 9 and 11 thereto.

[4] *See* Appendix "B" hereof at page 33a, paragraph 3, and the citations to *Interboro* at pp. 32a-33a.

for granting an application for the taking of depositions under Section 102.30 is error:

> If he [the Regional Director] meant, as he seems to say, that there is no pretrial discovery in labor proceedings, the Director erred. The Board's regulations expressly provide for pretrial depositions "if in his discretion good cause has been shown". 29 C.F.R. ¶ 102.30 (a). In a similar case, N.L.R.B. v. Safeway Steel Scaffolds Company of Georgia, 5 Cir. 1967, 383 F. 2d 273, 66 LRRM 2480, this Court pointed out that Section 102.30 (a) provides for the taking of pretrial depositions . . . *If discovery is practicable in the circumstances of the case* and if it is not used to harass or coerce employees, "[t]*he Board, acting in a quasi-judicial capacity as it does, should freely permit discovery procedure in order that the rights of all parties may be properly protected*". *N.L.R.B.* v. *Southern Materials Company, Inc.*, 4 Cir. 1965, 345 F. 2d 240, 59 LRRM 2220. *N.L.R.B.* v. *Miami Coca-Cola Bottling Co.*, 403 F. 2d 994, 996 (5th Cir., 1968). [Emphasis supplied]

As indicated within the quotation from the Fifth Circuit opinion, the Fourth Circuit also feels that the Board policies and rules should reflect its obligation to grant such pre-hearing discovery requests as are necessary to ensure all parties a fair hearing.

The *Interboro* decision of the Second Circuit is clearly the central case relied upon by those Courts of Appeals who have construed Section 10 (b) of the Act and Section 102.30 (a) of the Board's Rules and Regulations as not relevant to pre-hearing discovery in preparation for a hearing. Accordingly, the full text of the lengthy discussion of these points and of the Second Circuit's disagreement with the Fifth Circuit which is contained in *Interboro* is reproduced at Appendix "D" hereof.



## III.

**A respondent in an NLRB backpay proceeding is denied a meaningful hearing and the right to the effective assistance of counsel in preparing a defense to an alleged backpay charge when the respondent has the burden of proving that a backpay claimant incurred willful loss of earnings, but the respondent is denied any means even of discovering in advance of the hearing what factual allegations will be made by the backpay claimant as well as any means to prepare a defense thereto.**

The critical issue of constitutional import presented by this case is whether the Board will be permitted to apply its policy of absolute prohibition of the taking of prehearing depositions for the purpose of preparing for a hearing in the unique circumstances present in the context of a backpay proceeding.

This grave constitutional question is an unfortunate consequence of the fact that a deposition rule drafted as part and parcel of the procedural provisions for an unfair labor practice investigation and hearing was incorporated whole into the procedural provisions dealing with backpay proceedings – proceedings in which the difficulties involved in adequately preparing to defend are totally different from those characteristic of the unfair labor practice case.

Section 102.30 (a) of the Board's Rules and Regulations, Series 8, as amended, [29 CFR 102.30 (a)] is part of the subpart of the Board's Rules covering the unfair labor practice proceeding. With regard to Applications to Take Depositions, it states, in pertinent part, that "The regional director or the trial examiner, as the case may be, shall upon receipt of the application, IF IN HIS DISCRETION GOOD CAUSE HAS BEEN SHOWN,

make and serve upon the parties an order [granting the application]." (Emphasis supplied)

The subpart of the Board's Rules specifically addressed to backpay proceedings contains Section 102.59:

> *Sec. 102.59 Hearing; posthearing procedure.* After the issuance of a notice of hearing with or without backpay specifications, the procedures provided in Sections 102.24 to 102.51, inclusive, shall be followed *INSOFAR AS APPLICABLE.* (Emphasis supplied)

The fact is that the inherent differences between unfair labor practice proceedings for which the discretionary deposition rule was drafted and the procedural situation in the case in which a respondent is defending at a hearing for the purpose of determining backpay entitlement are so great as to result in a denial of the right to a meaningful hearing and the effective assistance of counsel guaranteed by the Fifth Amendment to the United States Constitution.

Section 102.15 of the Board's Rules requires that, when an unfair labor practice claim is initiated, a complaint be issued:

> ". . . stating the unfair labor practices . . . The complaint shall contain . . . (b) a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed." (29 CFR 102.15)

When in possession of a complaint drafted in accordance with the Rule, the respondent is in possession of all information needed for the purpose of conducting a thorough investigation of the specifically-described incident, interviewing the management personnel alleged to have participated, searching out independent witnesses to the alleged incident, and, in short, preparing to defend against the charges. Given a properly drawn complaint, a respondent employer is in as good a position as any other party to investigate the truth or falsity of the charges.



In the context for which the rule was drafted, a provision for the taking of depositions might indeed be reasonable when applied only to cover that rare case in which a witness would, for some reason, be unavailable for cross-examination at trial.[5] Indeed, this is the position taken by the Board throughout the litigation below:

> "The rule permitting depositions for 'good cause shown' means that depositions may be taken for use as evidence in an action when there is reason to believe that the witness whose deposition is sought may be unavailable at the hearing, and the rule was never intended to provide for taking of depositions solely for discovery purposes when the witness will be available for trial." (A. 209, See also N.L.R.B. Brief, pp. 33-34)

This stance, although it misinterprets the clear language of the rule, is perfectly logical in the context in which it was originated, namely, the unfair labor practice hearing, in which the factual allegations are set forth in the Complaint and concern events within the knowledge of both parties.

*However, the Board applies this theory to a backpay proceeding in which failure to mitigate is an issue in spite of the fact that it also takes the position that no inference of disentitlement to backpay may be drawn from unemploy-*

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[5] As indicated in Section II hereof, this is the limited interpretation of "good cause" which the Board attempts to apply regardless of the circumstances.

*ment over a long period of time*[6] *and has taken the position that the Company can meet its burden of proving the affirmative defense only by established facts showing there is no backpay liability or less than the amount claimed — the Board has itself held that simply cross-examining the claimant at the hearing about alleged efforts to find work and arguing they were inadequate will not suffice to meet the respondent's burden of proof. Southern Household Products Co., Inc.,* 1973 CCH NLRB ¶ 25,389 at p. 32,719, 203 NLRB No. 138 (1973).

Unfortunately, those who drafted Rule 102.59 rendering the provisions of Section 102.30 (a) "applicable" to backpay proceedings failed to consider that the major issue of fact to be determined in a backpay proceeding is an affirmative defense[7] *depending primarily upon information within the exclusive control of the discharged employees.*

In a backpay proceeding in which the extent to which the claimants have made a diligent effort to obtain suitable interim employment is raised as an affirmative defense in the Respondent's answer, "good cause" for the taking of claimants' depositions is *always* shown.

Unlike the specificity required in the unfair labor practice complaint, the Board's Rule setting forth the re-

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[6] *See* Appendix "A", Pages 19a-20a citing *N.L.R.B.* v. *Miami Coca-Cola Bottling Co.*, 360 F. 2d 569, 573-576 (5th Cir., 1966).

[7] It is well settled that in a backpay proceeding willful loss of earnings is an affirmative defense which the respondent has the burden of proving. *Virginia Electric and Power Co.*, 319 U.S. 533, 544 (1943); *N.L.R.B.* v. *Ohio Hoist Manufacturing Co.*, 496 F. 2d 14, 15 (6th Cir., 1974); *N.L.R.B.* v. *Brown & Root, Inc.*, 311 F. 2d 447 (8th Cir., 1963); *Nabors* v. *N.L.R.B.*, 323 F. 2d 686 (5th Cir., 1963), cert. denied, 376 U.S. 911 (1964); *N.L.R.B.* v. *J. G. Boswel Co.*, 136 F. 2d 585 (9th Cir., 1943); *Florence Printing Co.* v. *N.L.R.B.*, 376 F. 2d 216 (4th Cir., 1967), cert. denied 389 U.S. 840 (1968).



quired contents of a backpay specification, 29 CFR 102.53, does not provide for the inclusion therein of information known to the Board concerning the claimants' alleged unsuccessful efforts to find suitable alternative employment in an attempt to mitigate their damages. Due to the fact that the General Counsel is not required to and does not foresee and negate this affirmative defense to a Backpay Specification, a respondent *must* depose the claimants in order to obtain formal, verifiable declarations with regard to those factual allegations, *within the exclusive knowledge of the claimants,* which it will have the burden of disproving at the hearing. One of the major criteria utilized by the Courts in determining on which party the burden of proving an issue should be placed is the eminently logical and practical orientation that the burden of proof should be borne by the party having the greater access to the information upon which proof or disproof of the issue depends. However, the NLRB's backpay procedure features an affirmative defense, based entirely on the activities of claimants unknown to respondent, but which the respondent has the burden of proving.

Hence, proper resolution of a critical question of fact must depend upon one of two alternatives: (1) the extent to which counsel may render effective assistance to a backpay respondent in preparing his case by attempting to investigate, *during the hearing,* the factual accuracy of self-serving declarations with regard to damage mitigation revealed for the first time *at the hearing*; or (2) upon being granted a means of ascertaining and investigating, prior to the hearing, the allegations of backpay claimants with regard to their efforts to seek, procure and retain suitable alternative employment.

It will not do to suggest that an informal investigation would resolve the respondent's dilemma. Even if one

assumes that such an attempt to interview claimants on an informal basis with regard to their job-seeking efforts would generate candid cooperation by claimants and escape being itself held an unfair labor practice, absent a backpay specification addressed to such allegations, sworn testimony is the sole means of ensuring access to those factual allegations which *will* be asserted at the hearing and which a respondent will be required to refute in order to prevail on the mitigation issue.

Another possible solution to the dilemma would be reopening the hearing when, as in this case, it becomes apparent that a respondent has actually been deprived of an opportunity to present a defense. However, the backpay hearing was never reopened in the instant case.

As we have indicated above, prior to the actual formal hearing before the Administrative Law Judge, Petitioner was denied the right to take depositions and, therefore, the right even to know what proofs Petitioner would be required to make with regard to the issue of willful loss of earnings.

It is now necessary to consider whether this denial to Petitioner of an opportunity to know and to prepare Petitioner's case was cured at or after the hearing. We submit that it was not, rather, it was aggravated.

At the hearing, Petitioner was allowed, for the first time, to examine the claimants. The claimants testified to having allegedly contacted twenty-nine (29) different employers while unsuccessfully searching for suitable interim employment and demonstrated a uniform inability to remember the names of the company personnel with whom they allegedly talked. Furthermore, the claimants testified that fourteen (14) of the twenty-nine (29) employer contacts resulted in the filing of no formal written employment application.



Petitioner informed the Administrative Law Judge that it would go to the twenty-nine plants and depose the various members of the personnel department of each prior to reopening the hearing in order to ascertain which individuals within those departments were the persons to whom the backpay claimants said they talked when allegedly applying for employment. Petitioner wished, by this means, to ensure that only those persons found to possess knowledge relevant to the case would have to be placed under subpoena to appear at the reopened hearing. Again, Petitioner's request was denied — a denial which robbed Petitioner's counsel of the opportunity effectively to investigate the claimant's allegations and to present a defense.

There followed several interchanges between Petitioner and the Administrative Law Judge during which the Judge continued to insist that issuance of "scattergun" subpoenas for appearance at a hearing of all persons who might conceivably possess relevant knowledge was the only basis upon which he would reopen the hearing [A. 222-226, 233]. Convinced that the Administrative Law Judge would not alter his position, Petitioner then acquiesced, under protest, in the holding of a reopened hearing upon the terms mandated by the Judge. [A. 227, 234][8] Simul-

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[8] The Administrative Law Judge's order closing the record [A. 231], his Decision [Appendix "A", p. 12a], the Decision of the N.L.R.B. [Appendix "A", p. 2a, footnote 2], and the Opinion of the Court of Appeals [Appendix "B", p. 33a] all contain the factually inaccurate finding that Petitioner refused to acquiesce in the reopening of the hearing upon the terms insisted upon by the Administrative Law Judge. The record below contains both Petitioner's formal Motion [A. 227] and a letter to the Judge [A. 234-237] clearly indicating that, albeit under protest and expressly preserving its procedural objections to same, Petitioner would participate in such a hearing. The record reflects the fact that Petitioner hired a private investigator and submitted to the Administrative Law Judge his preliminary findings concerning alleged written em-

taneously, Petitioner notified the Administrative Law Judge of its intention of filing [A. 234-236] and did file, in the United States District Court for the Southern District of Ohio, an Application for Injunctive Relief from those procedural strictures imposed upon the reopened hearing which Petitioner felt rendered such a proceeding so manifestly calculated to discourage Petitioner from presenting a defense as to be violative of due process of law.

Apparently angered by Petitioners resort to the District Court, the Administrative Law Judge, as indicated in our statement of facts, forthwith closed the record rather than granting Petitioner's formal Motion that the date for the reopened hearing be suspended pending a decision by the Federal District Court [A. 229]. To this day, Petitioner has not had a single opportunity to examine under oath any of the prospective employers, whose testimony would be critical to Petitioner's case, nor to cross examine the claimants after developing the sworn facts from the employers allegedly contacted.

Thus, the effective denial of the right to a meaningful hearing and the effective assistance of counsel that commenced with the refusal of the NLRB to permit prehearing discovery was never cured. Having apparently been sufficiently uneasy about the constitutional validity of its prehearing procedural rulings to decide to undertake the wise course of reopening the record, the Board then permitted an angry Administrative Law Judge to "freeze" the case below in an unfinished posture involving a very serious and clearly defined constitutional issue.

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ployment applications in response to the Judge's directive that he be advised of "any evidence you have from any employer named by the claimants bearing on their claimed efforts to secure other employment" [A. 218-219] as a *precondition* to reopening the hearing. [A. 220, 233, 234-237]



Notwithstanding the presence in the case below of an Answer by Petitioner clearly raising the mitigation issue and two timely, properly executed Applications for the Taking of Depositions expressly stating that information with regard to the mitigation issue would be sought, the applications were denied by the Regional Director and Administrative Law Judge, respectively, relying in both instances, upon the discretion vested in them by Section 102.30 (a) of the Board's Rules and Regulations, Series 8, as amended, as rendered applicable to backpay proceedings by Section 102.59 of the Board's Rules.

Petitioner asserts that the following are the necessary consequences of the Board's refusal, affirmed by the Court of Appeals below, to recognize any circumstances other than the unavailablity of a witness for trial under which it will permit the prehearing taking of depositions by a respondent in a backpay proceedings notwithstanding the existence of circumstances, such as those present in the instant case, rendering such discovery necessary to insure that a respondent receives a meaningful hearing:

I. That Rule 102.59 must be deemed void as at variance with Section 6 of the National Labor Relations Act to the extent that application of Rule 102.30 (a) to a backpay proceeding results in a denial of due process of law. Section 6 of the Act provides:

> "The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this subchapter." (29 U.S.C. 156)

Such a rule, as interpreted by the Board, is clearly not "necessary to carry out the provisions of this subchapter." Congress should not be presumed to delegate the authori-

ty to enact rules and regulations which offend the Constitution.

II. That, as interpreted by the Board, NLRB Rules 102.59 and 102.30 (a) must be deemed *void as in contravention with the Administrative Procedure Act (APA).*

Section 5 of the APA provides, in pertinent part, that:

> "In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing . . .
>
> "(b) Persons entitled to notice of an agency hearing *shall be timely informed of* . . . (3) *the matters of fact and law asserted* . . .
>
> "(c) *The agency shall give all* interested parties opportunity for (1) *the submission and consideration of facts, arguments* . . . where time, the nature of the proceeding, and the public interest permit, and (2) . . . *hearing and decision on notice in accordance with sections 556 and 557 of this title.* 5 U.S.C.A. 554 (Emphasis supplied)

Section 7 of the APA, "Hearings", indicates that:

> (a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.
> . . .
>
> (c) Subject to the published rules of the agency and within its powers, employees who preside at hearings may — . . . (4) take depositions or have depositions taken *when the ends of justice would be served*:
> . . .
>
> (d) . . . *A party is entitled to* present his case or defense by oral or documentary evidence, to *submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.* (Emphasis supplied) 5 U.S.C. 556.



When facts essential to a defense available to a party are in exclusive control of third persons and revealed only at the hour of hearing, the ends of justice are not served and the right to submit rebuttal evidence and to cross examine are rendered an empty ritual.

III. That NLRB Rule 102.30 (a) becomes *unconstitutional as applied* to backpay proceedings, in which a respondent raises failure to mitigate as an affirmative defense, as it effectively authorizes discretionary denial of the right to the effective assistance of counsel and to a meaningful hearing guaranteed by the requirements for procedural due process under the Fifth Amendment to the United States Constitution.

Although the Constitution has never contained nor been interpreted as containing a provision which requires pretrial discovery as a matter of constitutional right, the Constitution has most definitely been interpreted as requiring a "meaningful hearing." When the circumstances are such that the granting of a motion for pre-trial discovery is an absolutely essential precondition for the conduct of a "meaningful hearing," said pre-trial discovery is most definitely required by the Constitution.

It is established beyond question that procedural due process requires more than an empty ritual called a "hearing" before an administrative agency will be permitted to deprive an individual of his property. It must be a "meaningful hearing." *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965); *accord,* citing *Armstrong, Goldberg* v. *Kelley,* 397 U.S. 254, 267 (1970). In 1938, this Court held that a rate making hearing conducted by the Secretary of Agriculture was constitutively defective. The observations of the Court with regard to the elements of a "meaningful hearing" needed to satisfy due process are directly in point in the instant case:

"The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise, the right may be but a barren one. Those who are brought into contest with the government in a quasi-judicial proceedings aimed at the control of their activities are entitled to be fairly advised of what the government proposes and to be heard upon its proposals before it issues its final demand."

"(The Court recognizes) . . . the necessity of maintaining the essentials of a full and fair hearing, with the right of the appellants to have a reasonable opportunity to know the claims advanced against them . . . The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."

*Morgan, et al.* v. *Wallace,* 304 U.S. 1, 18-19, 21, 22 (1938).

As previously indicated, the claimants represented by the National Labor Relations Board have exclusive control of those facts upon which the truth or falsity of claimants' entitlement to the full amount of backpay claimed depends. Absent an ability to compel claimants or claimants' counsel to reveal the efforts claimed to have been made to procure and retain suitable interim employment, the "right to submit argument" on this critical, pervasive



issue of a contested backpay specification is quite definitely "but a barren one."

This Court has long held the National Labor Relations Board to a high standard of fairness in exercising its quasi-judicial functions. In *N.L.R.B.* v. *Indiana & M.E. Co.,* 318 U.S. 9 (1943), this Court observed:

> "The Act accords a great degree of finality to the Board's findings of fact, and this Court has been insistent that the admonition of the Act be strictly observed. But courts which are required upon a limited review to lend their enforcement powers to the Board's orders are granted some discretion to see that the hearings out of which the conclusive findings emanate do not shut off a party's right to produce evidence or conduct cross-examination material to the issue. The statute demands respect for the judgment of the Board as to what the grievance proves. But the court is given discretion to see that before a party's rights are finally foreclosed his case has been fairly heard. Findings cannot be said to have been fairly reached unless material evidence which might impeach, as well as that which will support, its findings, is heard and weighed. *Id.* at 28.

Similarly instructive with regard to the instant question are the observations of this Court in a decision enforcing a Board order:

> ". . . *If the Board has* acted within the compass of the power given it by Congress, has, on a charge of unfair labor practice, *held a 'hearing,' which the statute requires, comporting with the standards of fairness inherent in* procedural due process, has made findings based upon substantial evidence and has ordered an appropriate remedy, a like obedience to the statutory law on the part of the Court of Appeals requires the court to grant enforcement of the Board's order. . . .

". . . Mindful of the separate responsibilities Congress has imposed upon the Board and the courts, we have carefully scrutinized this entire record. Within the range of our examination has appeared not merely the testimony but also the procedure followed from the filing of the charge before the Board to final decree of the Court of Appeals. *The Board and its representatives solicitously guarded respondent's and intervener's right to a full and fair hearing; manifested liberality in ruling upon evidence proposed by both sides; and conducted the proceedings in a manner calculated to bring about a just result.*" *N.L.R.B.* v. *Bradford Dyeing Association*, 310 U.S. 318, 343 (1940). [Emphasis supplied].

The instant case presents an excellent opportunity for this Court to issue a much needed reminder to the N.L.R.B. concerning its obligation to conduct its proceedings "in a manner calculated to bring about a just result." The factual context herein presents a clear example of the sort of circumstances in which application of the Board's policy of *never granting* a respondent's application for discovery as an aid in preparing for a hearing is not only unworthy of a federal agency vested with quasi-judicial powers but also raises a serious question with regard to the constitutionality of the Board's rulings upon the procedural issues in the case.

The critical importance of a ruling by this Court with regard to the Board's administration of the National Labor Relations Act in a manner which constantly approaches offending the requirements of procedural due process of law is evident from the scathing observations of two Federal District Courts and two Courts of Appeals regarding the Board's policy of ignoring all consideration of fairness when issuing its "automatic" rejections of applications for prehearing discovery:



". . . the Board in its brief argues that it was for the Company to call other employee witnesses to prove the negative of the alleged threatening conversation. We think otherwise. Firestone had attempted unsuccessfully to use discovery procedures, including interrogatories, to learn the names of Board witnesses. If the Labor Board may sometimes have sufficient reasons for delimiting discovery in order to protect employees from company reprisal, it must accept the burden of producting more evidence than might otherwise be necessary. It is basically unfair for Labor Board counsel to argue to this court that the Company should have produced witnesses whose names were unknown to the Company because of a policy decision of the Board. *Firestone Synthetic Fibers Co.* v. *N.L.R.B.*, 374 F. 2d 211, 214 (4th Cir., 1967).

* * *

"Justice under law is, of course, the ultimate goal of this Court. We exercise a broad discretion to require such proceeding to be had as may be just under the circumstances. We agree with the Fourth Circuit that under some circumstances the Board's decision not to provide discovery may result in unfairness. This Court is committed to the doctrine that when good cause is shown to the Board it should permit discovery in order that the rights of all parties may be properly protected. *N.L.R.B.* v. *Rex Disposables*, 494 F. 2d 588, 591-592 (5th Cir., 1974). [Citation omitted].

* * *

"This Court makes no effort to conceal its disapproval of the NLRB's apparent policy of restricting discovery in all proceedings to the bare legal minimum regardless of the circumstances of the case. It is this frustrating and in some cases unjust policy which has led to a rash of FOI Act suits against the NLRB and has compelled that agency to acquire the great familiarity with the FOI Act that it obviously possesses. *Deering*

*Milliken, Inc.* v. *Nash*, 90 LRRM 3138, 3149 (S.C. D.C., 1975).

* * *

"The Board is still at liberty to determine whether discovery is practicable in cases pending before it. It may adopt its own rules to govern its evaluation concerning discovery requests. But when a party makes a sufficient showing of necessity for discovery, the Board exceeds its authority under the Act when it enforces an inflexible rule denying all discovery in all cases. The Defendants' arbitrary and unilateral refusal to participate in any discovery has precluded plaintiff from preparing a defense, if indeed a defense is available to it. The defendants' refusal to even furnish plaintiff with a list of witnesses has deprived plaintiff an opportunity to obtain a fair hearing basic to due process. We, therefore, think that the Board's determination to deny discovery exceeds its authority and is contrary to the provisions of Sect. 10(b).

The interest the Board claims to be advancing by its across-the-board refusal is the necessity to expeditiously process the enormous number of cases pending before it. But this interest, important though it may be, cannot outweigh the need to advance the interest of justice and assure respondent's due process guarantee to a fair hearing. The defendants have not elected to evaluate the practicality of plaintiff's request for discovery, as mandated by Sect. 10(b). Rather, the defendant Regional Director has determined that the burden of any and all pre-trial discovery is impractical notwithstanding the fact that some discovery may advance the interest of justice." *McClain Industries, Inc.* v. *N.L.R.B.*, 381 F. Supp. 187, 189-190 (Mich. D.C., 1974), revd. on other gnds., 521 F. 2d 596 (6th Cir., 1975).



## CONCLUSION

It is respectfully submitted that this Court should grant the writ of certiorari requested on the grounds that the decision below is in direct conflict with the decisions of another Court of Appeals and that it is erroneous as a matter of law for the reason that the refusal of the National Labor Relations Board to permit prehearing discovery in the circumstances presented in the backpay proceeding involved in this case has resulted in a denial of the meaningful hearing guaranteed to Petitioner by the Fifth Amendment of the Constitution of the United States.

Respectfully submitted,

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ESTABROOK, FINN & McKEE
Of Counsel

## APPENDIX A

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UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

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Cases 9-CA-5745 and 9-CA-5811

---

VALLEY MOLD COMPANY, INC.

and

DISTRICT LODGE NO. 13 OF
THE INTERNATIONAL ASSOCIATION
OF MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO

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### SUPPLEMENTAL DECISION AND ORDER

On June 24, 1971, the National Labor Relations Board issued its Decision and Order directing that Respondent make whole certain employees for their losses resulting from Respondent's unfair labor practices in discharging or laying them off in violation of Section 8 (a) (3) of the National Labor Relations Act, as amended.[1] On December 16, 1973, the Regional Director for Region 9 issued a backpay specification and notice of hearing, to which Respondent duly filed an answer. A hearing was held before Administrative Law Judge George J. Bott on January 29 and

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[1] 191 NLRB 498.

30, 1974, at Moraine, Ohio, for the purposes of determining the amount of backpay due the discriminatees. On May 13, 1974, Administrative Law Judge Bott issued the attached Supplemental Decision, in which he found that the discriminatees were entitled to backpay as set forth opposite their names in the Administrative Law Judge's recommended Order. Thereafter Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions[2] of the Administrative Law Judge and adopt his recommended Order.

## ORDER

Pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Valley Mold Company, Inc., Englewood, Ohio, its officers, agents, successors, and

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[2] In adopting the Administrative Law Judge's conclusion that Respondent was not denied due process, we note especially the fact that as an adjudicated wrongdoer, the burden was on the Respondent to show any reduction in its backpay obligation. The Board's rules provide an adequate procedure to protect Respondent's rights. Having failed to seek a continuance at the close of General Counsel's case to seek further evidence other than through the disposition procedure and having demonstrated an unwillingness to abide by the procedures provided by the Board, Respondent cannot now convincingly argue that it has been denied due process in any way, or that it has been prejudiced by the application of the Board's rules in this proceeding.



assigns, shall take the action set forth in said recommended Order.

Dated, Washington, D.C. Dec. 3, 1974.

Edward B. Miller, Chairman
John H. Fanning, Member
Howard Jenkins, Jr., Member

NATIONAL LABOR
RELATIONS BOARD

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

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Cases Nos. 9-CA-5745 and 9-CA-7811

---

VALLEY MOLD COMPANY, INC.

and

DISTRICT LODGE NO. 13 OF
THE INTERNATIONAL ASSOCIATION
OF MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO

*Cassius B. Gravitt, Jr., Esq.*,
for the General Counsel.

*Thomas A. Holton, Esq.*, and
*R. Bruce Snyder, Esq.*, of
*Estabrook, Finn & McKee*,
Dayton, Ohio, for the Respondent.

## SUPPLEMENTAL DECISION AND ORDER

### Statement of the Case

GEORGE J. BOTT, Administrative Law Judge: On June 24, 1971, the Board issued its Decision and Order directing that Respondent make whole certain employees for their losses resulting from Respondent's unfair labor practices in discharging or laying them off in violation of Section 8(a) (3) of the National Labor Relations Act, as amended.[1] The Board's Order was subsequently enforced

[1] 191 NLRB 498.



by the United States Court of Appeals for the Sixth Circuit on October 26, 1972. Controversy having arisen over the amounts of backpay due under the terms of the Board's Order, on December 16, 1973, the Regional Director for Region 9 issued a Backpay Specification and Notice of Hearing. On December 28, 1973, Respondent filed an answer.

A hearing was held before me at Moraine, Ohio, on January 29 and 30, 1974. Briefs have been received from General Counsel and Respondent.

Upon the entire record in the case and upon my observation of the witnesses, I make the following:

### Findings and Conclusions

### I. Procedural Matters and Respondent's Due Process Contention

The case involves 8 backpay claimants who were found to have been discriminatorily discharged by Respondent in August, 1970, and 17 claimants who were found to have been discriminatorily laid off for a short period of time in June 1970.[2]

The Backpay Specification issued on December 14, 1973, and on December 28, 1973, Respondent filed an answer in which it stated in regard to all the claimants that it was "without knowledge or information sufficient to form a belief as to the amounts of net interim earnings, the extent to which the attempt to mitigate loss of earnings was timely, and the extent to which the amounts claimed represent other than a wilful failure to minimize loss of earnings . . . ."

[2] Six of the dischargees were also laid off in June and are included in the 17.

On January 4, 1974, Respondent filed with the Regional Director for Region 9 an Application for the Taking of Depositions of the eight persons who had been found to have been discriminatorily discharged.[3] The Application noted a desire to take the depositions before a notary public in the office of Respondent's counsel, and stated that the persons sought to be deposed would be examined on interim earnings and their efforts to mitigate loss of earnings.

The Regional Director issued an Order denying Respondent's application to take depositions on January 10, 1974, on the ground that good cause for the taking of depositions had not been shown as required by Section 102.30 of the Board's Rules and Regulations, Series 8, as amended, in that the application did "not appear to be based on the illness or unavailability of the witnesses," and the witnesses "reside within reasonable proximity of the place of hearing . . . ." The Regional Director in his Order also stated that what Respondent was actually seeking was "full pre-trial discovery," which the Board has held, with Court approval, it will not permit in unfair labor practice cases.[4]

As already indicated, the hearing took place before me on January 29 and 30, 1974. At the commencement of the hearing, Respondent reiterated its objection to proceeding with the hearing based upon the Regional Director's denial of its request to depose the claimants. General Counsel advised me that all of the claimants were present and were available for cross-examination, and I overruled Respondent's objection.

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[3] Glen Bowen, Mary Dafler, Shirley Hangen, Joanne Innis (Knox), Dorothy Johnson, Arthur E. Strange, Kathelene Strange, and Lana Woodgeard (Moore).

[4] On January 23, 1974, Respondent filed with the Regional Director Objections of Employer to Order Denying Application to Take Depositions, to which Counsel for the General Counsel responded on January 25, 1974.



At the hearing General Counsel called as his witnesses all of the eight claimants whom Respondent had sought to depose and, having examined them briefly on their interim earnings and efforts to find employment, turned them over to Respondent's counsel for cross-examination. On cross-examination the claimants testified to having made unsuccessful attempts to obtain employment at 29 different businesses.[5]

After General Counsel had rested his case-in-chief, Respondent moved for a continuance in order to take depositions from the employers whom the claimants had named as employers where they had sought employment, and also moved that, at a later date, after said employers had been deposed, the hearing be reconvened and the claimants brought back for further cross-examination.[6]

General Counsel opposed Respondent's motion, and I denied it. In denying Respondent's motion I commented that the motion was being considered in "its broadest aspects" as counsel had stated it, noting further that Respondent now wanted to depose all persons named by the claimants and have the claimants return for further examination on the basis of what might be discovered through the deposition procedure. Upon denial of Respondent's motion, Counsel for Respondent declined to go forward on the ground that he felt that he could not adequately defend Respondent because he had been denied a reasonable opportunity to present a defense.

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[5] The claimants also noted the existence of two Union staff members and two other persons who could corroborate their testimony about their job-seeking efforts.

[6] Counsel also included in his motion a request that the hearing be continued to such time as the testimony could be transcribed and counsel had an opportunity to read what the claimants had testified to.

Respondent filed a brief with me in which it repeated its arguments that it had been deprived of due process of law by being refused an opportunity to take depositions and to have the hearing continued, and it asked me to reconsider my ruling. Although Respondent had not asked only for time to investigate the claimants' assertions that they had looked for work at various establishments and for an opportunity to present evidence on that issue at a reopened hearing, but had instead reiterated its claim to a deposition procedure, nevertheless, on February 27, 1974, I wrote Counsel for Respondent and advised him that I would entertain a motion to reopen the record for "a limited purpose," that is, to take evidence from any employer named by the claimants. I also stated that although a deposition procedure requested by Respondent would not be followed, subpoenas would be available to Respondent, if the hearing were reopened, to insure the attendance of employer witnesses at the hearing.

On March 14, 1974, Respondent filed a motion to reopen the record, which I denied in a ruling made on March 20, 1974, on the ground that Respondent's motion to reopen and the motion it made at the close of General Counsel's case-in-chief were essentially identical.[7] In my ruling I repeated that I would, however, reopen the record to take admissible evidence from any person or employer involved in, or claimed to be involved in, the claimants efforts to secure employment. I pointed out that the additional hearing, if held, would be pursuant to the Board's Rules and Regulations, and that subpoenas would be available to Respondent prior to the hearing. I also indicated that at

[7] One of the purposes for reopening stated in the motion was, "To authorize the issuance to Respondent of subpoenas for the purpose of discovery in the nature of that allowed under the Federal Rules of Civil Procedure, including the taking of depositions."



the hearing I would consider Respondent's request to recall the claimants if it were made after Respondent had introduced any evidence it had bearing on the claimants efforts to secure interim employment.

On March 27, 1974, Respondent filed a Motion to Reopen the Record "under protest," and it indicated in an accompanying letter that it would petition the Federal District Court, at Dayton, Ohio, for injunctive relief.

On April 2, 1974, I issued an Order Reopening the Record for Additional Hearing to be held at Moraine, Ohio, on April 16, 1974, for the limited purposes previously stated by me.

On April 5, 1974, Respondent filed a complaint in the Federal District Court for the Southern District of Ohio, Western Division, and sent me a copy of it along with a Motion to Suspend Hearing Date. In its Complaint and Application for Injunctive Relief, Respondent asks the Court to issue an injunction ordering that "the Administrative Law Judge (1) postpone the reopening of the hearing for a reasonable time in order to accord Plaintiff sufficient time in which to accomplish the requisite investigation, (2) permit the taking of depositions in the matter, (3) issue subpoenas to all claimants requiring their appearance at the re-opened hearing."

On April 11, 1974, for the reasons stated therein. I issued an Order Withdrawing Order Reopening Record for Additional Hearing and Closing Record. A copy of that Order is attached hereto as Appendix A.

Respondent contends that it has been deprived of its constitutional right to a fair trial by the action of the Regional Director in denying its application to take depositions from the claimants prior to trial and by my denial of its motion for a continuance at the end of General Counsel's case to enable it to take depositions from employers or any

other person having evidence bearing on the claimant's efforts to secure interim employment. I find no merit in this contention for the following reasons:

First. Parties to judicial or quasi-judicial proceedings are not entitled to pretrial discovery as a matter of constitutional right,[8] and the Regional Director's action was in accordance with Board policy approved by the courts.[9] Since the witnesses (claimants) whom Respondent wished to depose were not unavailable and all lived reasonably close to the hearing site, it would be no burden on anyone to have them present at the hearing if necessary to testify. As appears, *infra*, they did appear and were cross-examined by Respondent. I find that the Regional Director did not abuse his discretion by denying Respondent's application.

Second. Respondent was not prejudiced by the rulings of the Administrative Law Judge but was in fact afforded more opportunities to prepare its defense than the law requires. As stated, each of the principal claimants whom Respondent sought to depose appeared and each of them was cross-examined at length.[10] After the claimants had disclosed the names of the employers at which they sought work after they had been discharged by Respondent, the most that Respondent was entitled to was a continuance for a reasonable period of time to enable it to investigate the witnesses' claims, but it was not entitled to depositions after the close of General Counsel's case for essentially the same reasons on which I have found the Regional Directo 's

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[8] *N.L.R.B.* v. *Interboro Contractors, Inc.*, 432 F. 2d 854 (C.A. 2).

[9] *N.L.R.B.* v. *Interboro Contractors, Inc.*, at 858; *Globe Wireless, Ltd.*, 193 F. 2d 748, 751 (C.A. 9); *Richard W. Kaase Company*, 162 NLRB 1320, 1321 n. 3; *B.B.S.A., d/b/a Burger Boy Food-O-Rama*, 164 NLRB 975. See also *Raser Tanning Co.*, 276 F. 2d 80, 83 (C.A. 6).

[10] All of the persons discriminatorily laid off were also available in the courtroom for cross-examination, and some were called to testify by General Counsel on another issue.



denial of discovery proper, that is, (1) discovery through depositions is not a required practice in Board proceedings, and (2) there was no showing that the employers or other persons the witnesses had contacted in their efforts to get work would not be available for trial.[11]

Respondent did not, however, request a continuance to conduct an investigation, but asked instead for a continuance to take depositions from employers of other persons who might have some evidence relating to the claimants' efforts to secure employment, a procedure it was not entitled to as a matter of right. A motion that the hearing be continued for a reasonable period of time so that Respondent might investigate what the claimants had testified to would have been granted, but, in my opinion, the motion made, including as it did a requirement that depositions be taken and the claimants be recalled at some indefinite time for additional examination, was properly denied.

Although Respondent did not make a specific, unqualified request for a continuance for investigative purposes, neither did I offer Respondent that opportunity. That Respondent's failure to limit its choice was not an oversight is apparent from its later actions, as described above, including its qualified motions to reopen the record and its action in the Federal Court, but, in any case, subsequently I twice offered Respondent an opportunity to call any employer or other person to a reopened hearing, with subpoenas available to insure their attendance, to testify on

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[11] *N.L.R.B.* v. *Interboro Contractors, Inc., supra.* See also *N.L.R.B.* v. *Miami Coca-Cola Bottling Company*, 360 F. 2d 569, 576 (C.A. 5). One of the claimants worked at an unidentified "body shop" in Tampa, Florida, before he was reinstated by Respondent, but this is an insignificant detail in the broader picture of Respondent's insistence on a general right to have discovery. Moreover, as appears below, I have allowed Respondent a credit for the wages which that claimant earned at said employer.

the subject of the claimants' efforts to find work, and I also indicated that the claimants might be required to testify again under certain conditions. But these terms did not satisfy Respondent, as its whole course of conduct shows, and finally, convinced that Respondent is unwilling to participate in a reopened hearing without first going the deposition route, I revoked my Order Reopening the Hearing.

I am in total agreement with Respondent that procedural due process requires a "meaningful hearing,"[12] but we diverge at the point where Respondent maintains that only through a deposition procedure in a backpay case can it receive a fair hearing. Insistent upon such a procedure, Respondent has neglected another method, namely, a continuance for a reasonable time and the use of subpoenas. Having elected to maintain its position on depositions in disregard of another no less meaningful way of proceeding, Respondent cannot fairly contend that it was deprived of a fair hearing.

Third. Respondent's argument that a deposition procedure must be used because the alternative is more inconvenient, inefficient and costly is not impressive.[13] According to Respondent, if depositions are not permitted it would have to subpoena to the hearing every individual in every company named by the claimants who "might" be a person contacted by a claimant or have information about which of his fellow employees might have been contacted. Respondent does not make it clear why it cannot investigate first and subsequently subpoena to the hearing the actual person who has admissible evidence to offer.

Respondent also maintains that a large number of companies whose personnel might have been deposed on the

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[12] *Morgan* v. *United States*, 304 U.S. 1, 18-19.

[13] This contention is found in Respondent's letter to me dated March 27, 1974, which accompanied its motion to reopen the record.



company premises at a convenient time will be put to the expense and inconvenience of having their personnel appear under subpoena at a hearing if depositions are not allowed, but this argument overlooks the fact that the General Counsel and each claimant are also entitled to appear at any deposition taking, an inconvenience and expense greater by far than that which would be incurred by any single company whose representative appeared under subpoena.

Finally, the contention ignores an important consideration, namely, that the persons deposed would still have to appear before the Administrative Law Judge if credibility resolutions are necessary, a needless duplication of effort and expense.

In my opinion, whatever merit there may be in the suggestion that Respondent be given before hearing more information than it is normally supplied about the claimants' efforts to secure interim employment, a discovery practice after the claimants have testified is certainly no less expensive and no more efficient than the Board's present practice, and it is no doubt slower.

For the reasons stated, and on the basis of the whole record, including Respondent's failure to request a continuance for investigative purposes at the end of General Counsel's case, its election twice not to unqualifiedly request that the hearing be reopened under the terms that I had laid down in my various communications and Rulings, and its continued insistence on obtaining a broad deposition procedure, all of which factors have unduly delayed a final disposition of the case, I find that Respondent has not been deprived of due process of law by the rulings of the Administrative Law Judge in not granting Respondent's requests to take depositions.

## II. Contentions Affecting More Than One Claimant

### A. Accuracy of the Computations

The Backpay Specification set forth a formula for measuring the average weekly earnings of discriminatees Glen Bowen, Mary Dafler, Shirley Hangen, Joanne Innis (Knox), Dorothy Johnson, Arthur E. Strange, Kathelene Strange, and Lana Woodgeard (Moore). It also gives a detailed breakdown of the gross backpay each of said discriminatees would have earned from Respondent absent the unlawful discrimination, as well as the interim earnings of these employees, and concludes with the net backpay alleged to be due each individual.

At the hearing, counsel for Respondent stated that, using the same method the Board had used in determining weekly average pay, his computations revealed that Bowen's weekly average was $118.93 instead of $133.80, as set forth in the Specifications, resulting in a deduction of $952.88 in Bowen's net backpay. Counsel also claimed that the Specifications incorrectly stated the third quarter of 1970 estimated earnings of Dorothy Johnson, Arthur Strange, Kathelene Strange, and Mary Dafler in that they worked fewer weeks in that quarter than stated in the Specification.

Respondent having specifically disputed the accuracy of General Counsel's figures and having been permitted to amend its answer accordingly, an issue was raised as to the accuracy of the Specification in that regard, and it was then General Counsel's burden to go forward with evidence to show, if he could, that the amounts set forth in the Specification were correct. Having failed to do this, I will deduct appropriate amounts from any backpay due said claimants.[14]

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[14] Section 102.54 and 102.57 Rules and Regulations National Labor Relations Board, Series 8, as amended. *Mastro Plastics Corporation*, 136 NLRB 1342, 1346.



### B. Discriminatees Who Engaged in the Strike

From August 27, 1970, through September 14, 1970, union adherents at Respondent's plant were on strike. The record indicates that discriminatees Johnson, Arthur Strange Kathelene Strange, Dafler, Bowen and Hangen, who were discriminatorily discharged prior to the strike, participated in the strike, and Respondent contends that since they would not have been available for work during the strike, their backpay should be tolled for that period. Respondent's contention is contrary to established Board policy, and I reject it.[15]

### C. Employees Discriminatorily Laid Off between June 23, 1970 and June 29, 1970

This group of 17 employees lost 3 or 4 days' work during the week in question as a result of the discrimination against them, but Respondent claims that because the Respondent installed a 6-day week and continued it after they were returned to work, all discriminatees recouped their lost time and money within 3 or 4 weeks. It claims that on that account nothing is due them.

I find no merit in Respondent's contention. Since the employees lost wages as a result of the discrimination, the proper measure of their loss is the wages they would have earned if they had not been discharged, less net earnings. Moreover, Respondent's contention is completely inconsistent with the terms of the Board's Order which was enforced by the Court of Appeals.[16]

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[15] *Winn Dixie Stores, Inc.*, 206 NLRB No. 125; *Sunshine Hosiery Mills*, 1 NLRB 664.

[16] *Valley Mold, Inc.*, 191 NLRB 498, 501, 502.

## III. The Individual Claims

### A. Controlling Principles

The law is well settled that the "finding of an unfair labor practice . . . is presumptive proof that some backpay is owed,"[17] and the General Counsel's burden is limited to showing "what would not have been taken from (the employees) if the Company had not contravened the act."[18] Another court described the allocation of the burden as follows:

> . . . in a backpay proceeding the burden is upon the General Counsel to show the gross amounts of backpay due. When that has been done, however, the burden is upon the employer to establish facts which would negative the existence of liability to a given employee or which would mitigate that liability.[19]

The failure of a discriminatorily discharged employee to make a reasonable search for employment constitutes an affirmative defense to backpay liability.[20] To carry his burden successfully in this area an employer must prove "losses which (the employee) wilfully incurred" and "clearly unjustifiable refusal to take desirable new employment."[21] The burden has also been described as showing that an employee "fails diligently to search for alternative work," [22] or "Failure . . . to make a reasonable search for

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[17] *N.L.R.B.* v. *Mastro Plastics Corporation*, 354 F. 2d 170, 178 (C.A. 2), cert. denied 384 U.S. 972.

[18] *Virginia Electric & Power Co.* v. *N.L.R.B.*, 319 U.S. 533, 544.

[19] *N.L.R.B.* v. *Brown & Root, Inc.*, 311 F. 2d 447, 454 (C.A. 8).

[20] *Marlene Industries Corporation* v. *N.L.R.B.*, 440 F. 2d 673, 674 (C.A. 6); *N.L.R.B.* v. *Reynolds*, 399 F. 2d 668, 669 (C.A. 6); *N.L.R.B.* v. *Miami Coca-Cola Bottling Company*, 360 F. 2d 569, 575 (C.A. 5).

[21] *Phelps-Dodge Corp.*, v. *N.L.R.B.*, 313 U.S. 177, 198-200.

[22] *N.L.R.B.* v. *Mastro Plastics Corp.*, 354 F. 2d 170, 174, n. 3.



interim work,"[23] or did not make an "honest good faith effort" to find it.[24] In seeking to mitigate his loss of income, an employee is held "only to reasonable exertion in this regard, not the highest standard of diligence."[25]

Respondent contends that Glen Bowen, Dorothy Johnson, Arthur E. Strange and Kathelene Strange are not entitled to any backpay because they did not diligently seek to obtain interim employment.

### B. Glen Bowen

Bowen was discharged on August 14, 1970, and offered reinstatement on March 13, 1973. After the second quarter of 1971, Bowen's interim earnings exceeded what he would have made working for Respondent and his claim, therefore, is based only on losses incurred prior to that time. In the third and fourth quaters of 1970 Bowen had no interim earnings, according to the Specification, but in the first and second quarters of 1971, Bowen earned elsewhere as much or more as he would have earned at Respondent.[26]

Bowen testified credibly and without contradiction that shortly after his discharge he registered for unemployment compensation and applied for work at four different companies in the area. He stated that he made applications only at places where he thought he had a reasonable chance of being employed, because he did not have funds for gasoline. He also testified credibly that he checked back

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[23] *N.L.R.B.* v. *Miami Coca-Cola Bottling Company, supra*, n. 20, at 575.

[24] *N.L.R.B.* v. *Cashman Auto Co.*, 223 F. 2d 832, 836 (C.A. 1).

[25] *N.L.R.B.* v. *Arduini Mfg. Co.*, 394 F. 2d 420, 423 (C.A. 1).

[26] Based on Respondent's claim that Bowen's average pay at Respondent during the period used in the Specification was $118 rather than $133.

with the four companies he originally applied to. He said he turned no jobs down, and was available for employment at all times.

As in the cases of the other discriminatees, there is no evidence in the record that there were jobs available for them in the area for which they were qualified, or any evidence to contradict their testimony that they looked for work and turned none down. The facts that Bowen obtained employment a little over 4 months after he was discharged and earned practically as much from that point as he would have earned if he had not been discriminated against makes Respondent's claim in Bowen's case appear frivolous, and I also credit his testimony that he registered for unemployment compensation, applied and reapplied for work at various companies, and was available for work. Respondent has not met its burden in Bowen's case.[27] I conclude, therefore, that Bowen is entitled to $2,380.00 in backpay, with interest.[28]

### C. Dorothy Johnson

Johnson's backpay period began on August 14, 1970, and ended with an offer of reinstatement on March 13, 1973, which she accepted. She had no interim earnings during that period.

On direct examination by General Counsel, Johnson testified that from August 1970 to March 1973, she was available for and sought employment and turned no job

[27] The only item that Respondent is able to point to in Bowen's case is the fact that he went hunting in Michigan with a friend in October 1970.

[28] Sum arrived at by deducting $952.00 from the amount set forth in the Specification, based on Respondent's figures in regard to his average weekly rate.



down. She registered for unemployment compensation and received it. She said she found it difficult to get work in the Dayton, Ohio area.

On cross-examination Johnson added that she checked regularly with the City unemployment bureau in Moraine, Ohio, as well as the State unemployment office, during her absence from Respondent, and she listed eight employers at which she had applied for work after her discharge. She stated that she visited these companies personally and also made telephone calls to them at later times. Her contacts were spread out over the entire period of her unemployment, she said, her last application being in late December 1972.

Johnson's testimony is uncontradicted, and I have no reason not to accept it as true. Respondent's position in her case seems to be that since she had no earnings for such an extended period, she could not have been looking for work. In a similar situation in *Miami Coca-Cola Bottling Company, supra,* the employer argued that the earnings of two employees were so "incredibly low" that it made a *prima facie* case of wilful losses during the backpay period, and it invited the Court to rule that an employer's proof of "incredibly low" earnings shifts to the General Counsel the burden of going forward with evidence that the discriminatees used reasonable efforts to find interim employment. The Court held that it would "decline the invitation" because it was not practical, and it would significantly hamper the backpay remedy, if each discriminatee were required to prove the propriety of his efforts during the entire backpay period."[29] In the instant case, Johnson testified credibly about her efforts to secure employment, and her lack of success in obtaining employment does not

[29] *Miami Coca-Cola Bottling Company, supra* n. 20, at 375.

impeach her testimony or relieve Respondent of its burden of proving facts to mitigate its liability.[30]

I find and conclude, therefore, that Dorothy Johnson is entitled to $12,560.18 in backpay, with interest, plus an amount of backpay for the period in June, 1970, when she was discriminatorily laid off with other employees, as discussed below.[31]

### D. Kathelene Strange

Kathelene Strange's backpay period began with her discharge on August 17, 1970, and ended with an offer of reinstatement on March 13, 1973. She testified credibly that from the time of her discharge until June 1, 1972, when she and her family went to Florida looking for work, she was available for work and looked for it in the Dayton, Ohio, area. She listed five employers where she applied for work before she left for Florida, four of which took written applications. She stated that she was out looking for work practically every week during that period and revisited the employers at which she had first applied. She listed her name with the Ohio Bureau of Employment Services and applied for unemployment compensation, which she received for the full period.

Mrs. Strange was unable to obtain any employment until she went to Florida on or about June 1, 1972. She remained in Florida for 9 months until she and her son Arthur were offered reinstatement by Respondent in March

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30 *N.L.R.B.* v. *Cashman Auto Co., supra* n. 24; *N.L.R.B.* v. *Nickey Chevrolet Sales, Inc.*, (C.A. 7), decided February 27, 1974 (85 LRRM 2826); *Cornwell Company, Inc.*, 171 NLRB 342, 343.

31 The sum has been arrived at by crediting Respondent with $170.73 on the total set out in the Specification on the basis of Respondent's figures regarding her gross backpay for the third quarter of 1970.



1973, which they both accepted. During that period she was employed by three employers and earned $636.40.

Respondent's position on Mrs. Strange is essentially the same as on Johnson's; having earned little or nothing, she could not have been diligently searching for work, but Respondent offered no evidence to establish this, and there was nothing in Strange's testimony or demeanor to cause me to discredit her. I find that Mrs. Strange did make reasonable efforts to secure interim employment.[32]

I find and conclude, therefore, that Kathelene Strange is entitled to $11,692.68 in backpay, with interest, plus backpay for the time she lost during her layoff in June 1970.[33]

### E. Arthur Strange

Arthur Strange is Mrs. Strange's son. Having been fired at the same time as his mother, his backpay period runs from August 14, 1970, until he was offered reinstatement on March 13, 1973.

Arthur Strange had no interim earnings from the time he was discharged until he went to Florida with his family in June 1972. While living in Florida, Strange found work at four different employers, earning approximately $2,700.

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32 Mrs. Strange was a packer at Respondent. Another discriminatee (Lana Woodgear) was hired by Hewitt Soap Company as a packer shortly after she was discharged, and Respondent argues that this indicates that Strange could also have been employed there if she really wanted a job. There is no evidence in the record, however, that Hewitt Soap needed any more packers or that Strange knew that they did. Actually, she testified that she did not. It also appears from Woodgeard's testimony that she worked for approximately a month only at Hewitt and was then laid off, an indication that the demand for labor at Hewitt was not good either.

33 The figure in the Specification has been adjusted by deducting $167.61 from gross backpay in the third quarter of 1970 on the basis of Respondent's figures for that period.

When he was offered reinstatement by Respondent in March, 1973, he returned to Respondent's employ, where he now works.

Strange testified that he applied for unemployment compensation after his discharge, and also applied and reapplied for work at five different employers that he was able to name. He also testified that he "looked for more work than that" meaning, I infer, that he went to other establishments, but could not remember them. He also stated that he was looking and available for work from the time of his discharge to the end of 1971. In 1972, Strange went to Florida because his uncle told him he might find work there. The matter was not fully developed, but it appears that before he left for Florida, Strange applied to Respondent for work and actually did a small construction job for Mr. Earl Valley, Respondent's president. In addition, Strange sought work from and did odd jobs for a Mrs. Mason before he left for Florida.

Respondent contends that Strange's low interim earnings establish wilful losses of earnings, but I am unwilling to so infer, contrary to his uncontradicted and credited testimony, for the reasons stated in Johnson's and Mrs. Strange's cases.

I find and conclude, therefore, that Arthur Strange is entitled to backpay in the amount of $12,207.22, with interest.[34]

### F. Mary Dafler

Dafler was discharged on August 14, 1970 and offered

[34] The amount set forth in the Specification has been adjusted to give Respondent credit for the sum of $916.00 which Strange earned at a "body shop" in Florida, which was not listed as interim earnings in the Specification, and an additional amount of $86.34 based on Respondent's calculations, because of an error in the gross backpay listed for the third quarter of 1970 in the Specification.



reinstatement on September 14, 1970. She testified that she was available for work and looked for it during that period. There is no evidence to contradict her testimony, and I find, therefore, that Dafler is due $237.17, with interest.[35]

### G. Shirley Hangen

Hangen registered for unemployment compensation, applied for work at five different establishments, and was available for work during the period after her discharge on August 17, 1970, until she was offered reinstatement on September 14, 1970. Indicating the state of the labor market in the area in 1970, she said that she could not even get an interview at the places she applied for work. There is nothing in the record to contradict Hangen's testimony, and I find, therefore, that she is due backpay in the amount of $277.96, with interest, plus an amount to cover the period of her layoff in June 1970.

### H. Joanne Innis (Knox)

Discharged on August 17, 1970, and offered reinstatement on September 14, 1970, this discriminatee testified credibly and without contradiction that she applied for work at two companies and the State unemployment office, which sent her to another employer for a test. When the latter employer subsequently offered her a job, she left Respondent's employ.

I find and conclude that Joanne Innis (Knox) is entitled to $299.00 in backpay, with interest, because of her dis-

[35] Figure in Specification adjusted on the basis of Respondent's calculations indicating error in gross backpay figure for third quarter of 1970.

charge, plus a sum of money because of her layoff, as found below.

### I. Lana Woodgeard (Moore)

This employee was discharged on August 17, 1970, and offered reinstatement on September 14, 1970. She was also discriminatorily laid off for 3 days in June 1970. Respondent concedes that the record indicates that this discriminatee merits the full net backpay claimed. I find and conclude that she is owed $87.14, with interest, plus a sum of money to cover her layoff, as set forth below.

### J. The Discriminatory Layoffs

Seventeen employees were discriminatorily laid off between June 23, 1970 and June 29, 1970, and lost from 3 to 4 days work. General Counsel amended the Backpay Specification at the hearing to change the computations listed on page 9 of the Specification. Sworn testimony from a number of employees was also taken supporting General Counsel's position. Respondent did not dispute the amended calculations, but it has taken the position that the employees are entitled to nothing because their workweek was extended after they were reinstated. I have previously rejected this contention.[36]

On the basis of the amended Specification and on the entire record in the case, I find that the following individuals are due the amounts set forth after their names:

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[36] Section II, C, above.



| Name | Shift | Hours Lost and Rate Per Hour | | | Amount Due |
|---|---|---|---|---|---|
| Mary Dafler | 1st | 22.5 | at | $2.15 | $48.37 |
| Juanita Evans | 2nd | 31.5 | at | $2.10 | $66.15 |
| Evelyn Good | 1st | 22.5 | at | $2.15 | $48.37 |
| Shirley Hangen | 1st | 22.5 | at | $2.15 | $48.37 |
| Elmer Harden | 3rd | 24 | at | $2.15 | $51.60 |
| Joanne Innix (Knox) | 1st | 22.5 | at | $2.15 | $48.37 |
| Dorothy Johnson | 2nd | 31.5 | at | $2.15 | $67.72 |
| Judith Mast | 1st | 22.5 | at | $2.15 | $48.37 |
| Rita Mast | 1st | 22.5 | at | $2.15 | $48.37 |
| Mary Meadows | 3rd | 24 | at | $2.10 | $50.40 |
| Ladonna Mefford | 3rd | 24 | at | $2.15 | $51.60 |
| Gloria Standafer | 2nd | 31.5 | at | $2.10 | $66.15 |
| Stella Stone | 2nd | 31.5 | at | $2.15 | $67.72 |
| Kathelene Strange | 2nd | 31.5 | at | $2.15 | $67.72 |
| Martha Williams | 3rd | 24 | at | $2.15 | $51.60 |
| Lana Woodgeard (Moore) | 3rd | 24 | at | $2.00 | $48.00 |
| Sylvia Watson | 2nd | 31.5 | at | $2.00 | $63.00 |

## RECOMMENDED ORDER[37]

On the basis of the findings and conclusions set forth above it is hereby ordered that Valley Mold Company, Inc., its officers, agents, successors and assigns, shall pay to the employees involved in this proceeding as net backpay the amount set forth opposite their names.

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[37] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

**B. As a Result of the Discriminatory Discharges**

| Name | Amount |
|---|---|
| Glen Bowen | $2,380.00 |
| Mary Dafler | $238.17 |
| Shirley Hangen | $277.96 |
| Joanne Innis (Knox) | $299.00 |
| Dorothy Johnson | $12,560.81 |
| Arthur E. Strange | $12,207.22 |
| Kathelene Strange | $11,692.68 |
| Lana Woodgeard (Moore) | $87.14 |

**B. As a Result of the Discriminatory Layoffs**

| Name | Amount Due |
|---|---|
| Mary Dafler | $48.37 |
| Juanita Evans | $66.17 |
| Evelyn Good | $48.37 |
| Shirley Hangen | $48.37 |
| Elmer Harden | $51.60 |
| Joanne Innis (Knox) | $48.37 |
| Dorothy Johnson | $67.72 |
| Judith Mast | $48.37 |
| Rita Mast | $48.37 |
| Mary Meadows | $50.40 |
| Ladonna Mefford | $51.60 |
| Gloria Standafer | $66.15 |
| Stella Stone | $67.72 |
| Kathelene Strange | $67.72 |
| Martha Williams | $51.60 |
| Lana Woodgeard (Moore) | $48.00 |
| Sylvia Wilson | $63.00 |

Each of the foregoing sums shall accrue interest at the rate of 6 percent per annum, computed in the manner set forth in *Isis Plumbing & Heating Co.,* 138 NLRB 716.



There shall be deducted from each of the amounts social security taxes, income tax withholding and such other deductions as may be required by the laws of the United States or the State of Ohio.

Dated at Washington, D.C., May 13, 1974.

/s/ George J. Bott
Administrative Law Judge

APPENDIX A TO
SUPPLEMENTAL DECISION AND ORDER

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UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

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Case Nos. 9-CA-5745 and 9-CA-5811

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VALLEY MOLD COMPANY, INC.

and

DISTRICT LODGE NO. 13 OF THE
INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
AFL-CIO

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**ORDER WITHDRAWING ORDER REOPENING RECORD FOR ADDITIONAL HEARING AND CLOSING RECORD**

Following my letter dated February 27, 1974, advising Respondent's counsel that I would reopen the record in the case for a limited purpose, if a proper motion were filed, Respondent, on March 14, 1974, filed a Motion to Reopen the Record, which I denied on March 20, 1974, for the reasons stated therein, but in my Ruling, a copy of which is attached, I repeated that, upon request, I would reopen the record for certain purposes and under certain terms and conditions.



On March 27, 1974, Respondent filed a Motion to Reopen the Record in which it stated, in part, that the motion was made "under protest" and "in accordance with the Ruling of Administrative Law Judge, George J. Bott, dated March 20, 1974, to reopen the record for the limited purposes described therein." In an accompanying letter, counsel for Respondent advised me, *inter alis,* that "Respondent will accept your invitation to move to reopen the record for the limited purpose and under the rules described in your letter of February 27, 1974 . . . ." However, in the letter, counsel continued to express dissatisfaction with the terms upon which I had ruled I would reopen the record and indicated that Respondent would petition the Federal District Court, at Dayton, Ohio, for injunctive relief.

On April 2, 1974, I issued an Order Reopening the Record for Additional Hearing to be held at Moraine, Ohio, on April 16, in which I again tried to make it clear that the hearing would be conducted in accordance with my ruling on March 20, 1974.

On April 8, 1974, I received from counsel for Respondent a copy of a complaint which Respondent had filed on April 5 in the Federal District Court for the Southern District of Ohio, Western Division, and a Motion to Suspend Hearing Date. In a Memorandum attached to the Motion, Respondent states that it has filed "an Application for Injunctive Relief from the Ruling of the Administrative Law Judge with regard to the conditions under which a reopening of the record would be permitted in the instant case." In its Motion, Respondent asked that I suspend the reopening of the hearing pending decision of the Court on Respondent's Application for Injunctive Relief "from the limitations placed upon the reopening of the record."

In its Complaint and Application for Injunctive Relief, Respondent asks the Court to issue an injunction ordering

that "the Administrative Law Judge (1) postpone the reopening of the hearing for a reasonable time in order to accord Plaintiff sufficient time in which to accomplish the requisite investigation, (2) permit the taking of Depositions in this matter, (3) issue subpoenas to all claimants requiring their appearance at the re-opened hearing."

It is now evident to me that Respondent has no intention and is unwilling to participate in a reopened hearing under the terms and conditions described in my ruling of March 20, 1974, incorporated by reference in my Order Reopening the Record for Additional Hearing, dated April 2, 1974. Since my Order Reopening the Record was based upon my assumption that Respondent would comply with the conditions outlined in it and since that assumption has been proven to be ill-founded, the premise on which I ordered the record reopened is no longer valid.

THEREFORE IT IS ORDERED that the Order Reopening the Record for Additional Hearing be withdrawn and the record closed.

A Decision on the merits of the case will issue in due course.

/s/ George J. Bott
Administrative Law Judge

Dated: April 11, 1974



## APPENDIX B

No. 75-1292

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

| | |
|---|---|
| NATIONAL LABOR RELATIONS BOARD, *Petitioner*, v. VALLEY MOLD COMPANY, INC., *Respondent*. | APPLICATION for Enforcement of an Order of the National Labor Relations Board. |

Decided and Filed February 17, 1976.

Before: PHILLIPS, Chief Judge, and CELEBREZZE and McCREE, Circuit Judges.

PHILLIPS, Chief Judge. This is a supplemental proceeding to a decision of this court, reported at 467 F.2d 483 (1972), in which we enforced the order of the Board against Valley Mold Company, Inc., 191 NLRB 498 (1971). The Board found, *inter alia*, that the Company violated § 8(a) (3) and (1) of the Act by discriminatorily laying off seventeen named employees for the purpose of discouraging membership in the Union and by discharging nine employees because of their activities on behalf of the Union. The Board's order, enforced by this court, required that the Company: (1) make whole certain named employees for any loss they may have suffered by reason of the discriminatory lay off; (2) offer certain named

employees immediate and full reinstatement to their former or substantially equivalent positions; and (3) make them whole for any loss of earnings suffered as a result of the discrimination against them.

When the parties were unable to agree upon the amount of backpay due the discriminatees, a backpay proceeding was instituted. The Board's Supplemental Decision and Order is reported at 215 NLRB No. 38 (1974). This order allows backpay to eight named dischargees in the amout of $39,742.98 and $941.90 to seventeen employees found discriminatorily laid off. Reference is made to the reported supplemental decision of the Board for a detailed recitation of pertinent facts.

The company vigorously contests the backpay order. Its principal contention is that the Administrative Law Judge abused his discretion by refusing to permit the Company to take discovery depositions prior to the reopened hearing. The Company hoped to minimize the backpay awards by ascertaining the names of persons in the offices of prospective employers, where backpay claimants alleged they sought employment. We find no merit in this contention. Section 10 (b) of the Act, 29 U.S.C. § 160 (b), provides that unfair labor practice hearings:

> [S]hall, so far as practicable, be conducted in accordance with the rules of evidence applicable to the district court of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States. . . .

The Act does not require the Board to follow the discovery procedures set forth in the Federal Rules of Civil Procedure. *N.L.R.B.* v. *Interboro Contractors, Inc.,* 432 F.2d 854, 859 (2d Cir. 1970), *cert. denied,* 402 U.S. 915 (1971). Since there is no specific provision in the Act for discovery procedures, it is the responsibility of the Board, so long as



it conforms to the requirements of due process, to formulate its own rules as to when discovery is available to a party. *Electromec Design & Development Co.* v. *N.L.R.B.,* 409 F.2d 631, 635 (9th Cir. 1969). It is a matter within the discretion of the Board as to whether to participate in or permit pretrial discovery. *Trojan Freight Lines* v. *N.L.R.B.,* 356 F.2d 947, 948 (6th Cir. 1966).

The company contends that it was deprived of due process by the rejection of its application to take prehearing depositions and by the denial by the Administrative Law Judge of its motion for a continuance, at the end of the General Counsel's case, to enable it to take depositions from employees and others having evidence bearing on the efforts of claimants to secure interim employment. It is well settled that parties to judicial or quasi-judicial proceedings are not entitled to discovery as a matter of constitutional right. *Interboro Contractors,* 432 F.2d at 857-58; *Starr* v. *Commissioner,* 226 F.2d 721, 722 (7th Cir. 1955), *cert. denied,* 350 U.S. 993 (1955).

The Administrative Procedure Act does not confer a right to discovery in federal administrative proceedings. *Frilette* v. *Kimberlin,* 508 F.2d 205, 208 (3d Cir. en banc 1974), *cert. denied,* 421 U.S. 980 (1975).

In the present case the General Counsel produced all claimants, and they were made available for cross-examination by the Company. Further, the Administrative Law Judge twice offered the Company the opportunity to reopen the record for the purpose of taking admissible evidence from any person or employer involved in or claimed to be involved in the claimants' efforts to secure interim employment; and stated that subpoenas would be available to insure the attendance of witnesses. The Company continued to insist on discovery deposition procedure and initiated an unsuccessful action against the Board in the United States District Court.

We find no merit in the Company's claim of deprivation of due process.

From August 27, 1970, through September 14, 1970, the Union engaged in a strike at the Company's plant. All nine of the backpay claimants were discharged prior to the strike and six of them participated in the strike. The Company contends that claimants' backpay should be tolled for the eighteen days they participated in the strike, relying upon *N.L.R.B.* v. *Rogers,* 406 F.2d 1106 (6th Cir. 1969) and 427 F.2d 712 (6th Cir. 1970.) We find the present case to be distinguishable from *Rogers.* None of the employees involved here engaged in any of the extensive union activity carried on by the claimant in *Rogers.* It cannot be said that the employees would not have struck had they not been discriminatorily discharged. This court's decision in *Rogers* is no bar to the Board's finding that backpay in the present case should not be tolled during the period of the strike.

All other contentions of the Company have been considered and are found to be without merit.

The order of the Board will be enforced.



## APPENDIX C

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## STATUTES INVOLVED

### NATIONAL LABOR RELATIONS ACT, Section 6, 29 U.S.C. 156

The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this subchapter.

July 5, 1935, c. 372, § 6 (a), 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140.

* * *

### NATIONAL LABOR RELATIONS ACT, Section 10(b), 29 U.S.C. 160(b)

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period

shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

* * *

**ADMINISTRATIVE PROCEDURE ACT, Section 5, 5 U.S.C. 554**

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;



(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the

agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty. Pub.L. 89-554, Sept. 6, 1966. 80 Stat. 384.

* * *



## ADMINISTRATIVE PROCEDURE ACT, Section 7, 5 U.S.C. 556

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

(1) administer oaths and affirmations;

(2) issue subpenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact



not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 386.

* * *

## RULES AND REGULATIONS OF THE NATIONAL LABOR RELATIONS BOARD,

### Series 8, as amended, 29 C.F.R.

**§ 102.15**

After a charge has been filed, if it appears to the regional director that formal proceedings in respect thereto should be instituted, he shall issue and cause to be served upon all the other parties a formal complaint in the name of the Board stating the unfair labor practices and containing a notice of hearing before an administrative law judge at a place therein fixed and at a time not less than 10 days after the service of the complaint. The complaint shall contain (a) a clear and concise statement of the facts upon which assertion of jurisdiction by the Board is predicated, and (b) a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed.

**§ 102.30**

Witnesses shall be examined orally under oath, except that for good cause shown after the issuance of a complaint, testimony may be taken by deposition.

(a) Applications to take depositions shall be in writing setting forth the reasons why such depositions should be taken, the name and post office address of the witness, the matters concerning which it is expected the witness will

testify, and the time and place proposed for the taking of the deposition, together with the name and address of the person before whom it is desired that the deposition be taken (for the purposes of this section hereinafter referred to as the "officer"). Such application shall be made to the regional director prior to the hearing, and to the administrative law judge during and subsequent to the hearing but before transfer of the case to the Board pursuant to § 102.45 or § 102.50. Such application shall be served upon the regional director or the administrative law judge, as the case may be, and upon all other parties, not less than 7 days (when the deposition is to be taken within the continental United States) and 15 days (if the deposition is to be taken elsewhere) prior to the time when it is desired that the deposition be taken. The regional director or administrative law judge, as the case may be, shall upon receipt of the application, if in his discretion good cause has been shown, make and serve upon the parties an order which will specify the name of the witness whose deposition is to be taken and the time, the place, and the designation of the officer before whom the witness is to testify, who may or may not be the same officer as that specified in the application. Such order shall be served upon all the other parties by the regional director or upon all parties by the administrative law judge.

**§ 102.53 Contents of back-pay specification and of notice of hearing without specification**

**(a) Contents of back-pay specification.** Where the specification procedure is used, the specification shall specifically and in detail show, for each employee, the back-pay periods broken down by calendar quarters, and specific figures and basis of computation as to gross back pay and interim earnings, the expenses for each quarter, the net back pay due, and any other pertinent information.



**§ 10259 Hearing; posthearing procedure**

After the issuance of a notice of hearing with or without back-pay specification, the procedures provided in §§ 102.24 to 102.51, shall be followed insofar as applicable.

## APPENDIX D

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**432 F.2d 854 (1970)**

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

INTERBORO CONTRACTORS, INC.,
Respondent.

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No. 51, Docket 34556.

United States Court of Appeals, Second Circuit.

Argued and Decided Sept. 24. 1970.

Application for enforcement of supplemental decision and order of National Labor Relations Board directing company to pay certain sums as back pay award to two employees who were wrongfully discharged. The Court of Appeals, Lumbard, Chief Judge, held, among other things, that Board's rule as to taking of depositions does not provide for taking of depositions for purpose of pretrial discovery.

Order enforced.

[855]

LUMBARD, Chief Judge:

We grant, in open court, enforcement of the Supplemental Order of the National Labor Relations Board directing the respondent Interboro Contractors, Inc. to pay $8,183.00 and $8,292.00 respectively to John and William Landers who had been improperly discharged, as we held in N.L.R.B. v. Interboro Contractors, Inc., 388 F.2d 495 (2d Cir. 1967). We file a written opinion in order to set forth our reasons for holding that parties in a proceeding before the Board and its examiner are not entitled to the full panoply of discovery procedures provided by the Federal Rules of Civil Procedure.

* * *

[857]

The Company's second claim is that it did not receive a fair hearing because it was not allowed to take depositions of the Landers. The Company applied for leave to take their depositions prior to the hearing, for the stated purpose of aiding counsel in the preparation of his case for trial. Both parties agree that the application amounted to a request for pre-hearing discovery. The Board contends that its Rule 102.30 permitting depositions for "good cause shown" means that depositions may be taken for use as evidence in an action when there is reason to believe that the witness whose deposition is sought may be unavailable at the hearing, and that the Rule was never intended to provide for the taking of depositions solely for discovery purposes when the witnesses will be available for trial. We agree.

It is well settled that parties to judicial or quasi-judicial proceedings are not entitled to pre-trial discovery as a [858] matter of constitutional right. Starr v. Commissioner of Internal Revenue, 226 F.2d 721, 722 (7th Cir.), cert. denied 350 U.S. 993, 76 S.Ct. 542, 100 L.Ed. 859 (1955); Miner v. Atlass, 363 U.S. 641, 80 S.Ct. 1300, 4 L.Ed.2d



1462 (1960). In fact, until Rule 26 of the Federal Rules of Civil Procedure (FRCP) became effective in 1938, pre-trial discovery was not available in the federal courts. Moreover, the National Labor Relations Act does not specifically authorize or require the Board to adopt discovery procedures. N.L.R.B. v. Globe Wireless, Ltd., 193 F.2d 748, 751 (9th Cir. 1951). Although section 6 of the Act does give the Board the necessary rule-making power to carry out the Act, the provision places the Board under no obligation to adopt particular pre-trial procedures. Indeed several cases arising under the Act have held that, although the Board may possess the necessary rule-making power, the circumstances under which discovery will be permitted is a matter committed to the Board's discretion. See Electromec Design & Development Co. v. N.L.R.B., 409 F.2d 631, 635 (9th Cir. 1969); N.L.R.B. v. Vapor Blast Mfg. Co., 287 F.2d 402, 407 (7th Cir.), cert. denied 368 U.S. 823, 82 S.Ct. 42, 7 L.Ed.2d 28 (1961); North American Rockwell Corp. 1. N.L.R.B., 389 F.2d 866, 871-872 (10th Cir. 1968).

The predecessor of the present Board Rule 102.30 was adopted and became effective in 1935, three years before Rule 26 of the FRCP entitled litigants in federal courts to take depositions "for the purpose of discovery." That Board Rule was patterned after former Equity Rule 47, which Rule 26 of the FRCP superseded, and which permitted the taking of depositions "upon good and execptional cause" for the purpose of obtaining and preserving evidence for trial, not for the purpose of discovery.[3] The Board's Rule has not changed substantially; it did not then authorize,

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[3] As the Historical Commentary to Rule 26, FRCP, indicates (at p. 291), "Equity Rule 47 authorized * * * taking depositions of named witnesses for use at the trial for good and exceptional cause for departing from the general rule, the general rule being 'no depositions.' The purpose here was not discovery but obtaining proof" (quoting from 45 W.Va.L.Q. 5).

and has not since authorized the taking of depositions for discovery purposes. The Board has consistently upheld this interpretation and has construed the Rule as requiring more than a showing that the taking of depositions would aid counsel in the preparation of his case for trial. See Mastro Plastics Corp., 136 N.L.R.B. 1342, 1344, n. 7 (1962), enforced in relevant part, Master Plastics Corp. v. United States, 354 F.2d 170, cert. denied 384 U.S. 972, 86 S.Ct. 1862, 16 L.Ed.2d 682 (1965); Van Raalte, Inc., 69 N.L.R.B. 1326, 1327 (1946); Walsh-Lumpkin Wholesale Drug Co., 129 N.L.R.B. 294, 296, n. 8 (1960); Plumbers and Steamfitters Union Local 100, 128 N.L.R.B. 398, 400 n. 8, enforced N.L.R.B. v. Plumbers and Steamfitters etc. 291 F.2d 927 (5th Cir. 1961); Del E. Webb Constr. Co., 95 N.L.R.B. 377, n. 2. In short, Rule 102.30 does not on its face, or as interpreted by the Board, provide for the taking of depositions for the purpose of pretrial discovery.

The Board's policy, moreover, is a logical one. Indeed, other administrative agencies have the same policy. In FMC v. Anglo-Canadian Shipping Co., 335 F.2d 255 (9th Cir. 1964), the Ninth Circuit held that the Merchant Marine Act does not warrant, much less require, the adoption of pre-trial discovery procedures by the Federal Maritime Commission. The same result has been reached in proceedings in which pre-trial discovery has been sought before the Tax Court of the United States. See Louisville Buildings Supply Co. v. Commissioner of Internal Revenue, 294 F.2d 333, 339-342 (6th Cir. 1961). The Administrative Procedure Act contains no provision for pre-trial discovery in the administrative process, and our research discloses no federal agency which gives litigants the right [859] to pre-hearing discovery in proceedings before it.[4]

[4] Nevertheless, we recognize that some authorities have taken the position that there should be pre-trial discovery in administrative proceedings. See Berger, Discovery in Administrative Proceedings, 12 Ad.L. Bull. 28 (1959); Berger, Discovery in Administrative Proceedings: Why Agencies Should Catch up with the Courts, 46 A.B.A.J. 74 (1960); Kaufman, Have Administrative Agencies Kept Pace with Modern Court-Developed Techniques against Delay?—A Judge's View, 12 Ad.L.Bull. 103, 115 (1959-60); Gallagher, Use of Pre-Trial as a Means of Overcoming Undue and Unnecessary Delay in Administrative Proceedings, 12 Ad.L.Bull. 44 (1959-60); and Cox, Adherence to the Rules of Evidence and Federal Rules of Civil Procedure as a Means of Expediting Proceedings, 12 Ad.L.Bull. 51, 55 (1959-60).



We are not persuaded by the contrary position taken by the Fifth Circuit. In N.L.R.B. v. Safway Steel Scaffolds Co. of Georgia, 383 F.2d 273 (5th Cir.), cert. denied 390 U.S. 955, 88 S.Ct. 1052, 19 L.Ed.2d 1150 (1967), and N.L.R.B. v. Miami Coca-Cola Bottling Co., 403 F.2d 994 (5th Cir. 1968), it stated that Rule 102.30 does provide for pre-hearing discovery. This position, however, not only ignores the origins of the Rule, but rests on three untenable premises: first, that a 1947 amendment to section 10 (b) of the Act requires the Board to provide for pre-hearing discovery where practicable; second, that a Committee on Revision of the Board's Rules and Regulations subsequently recommended that the Board's rules be revised to adopt a pre-hearing discovery procedure; and finally, that section 102.30 of the Board's rules was thereafter amended to incorporate the recommended change.

Section 10 (b) of the Act provides that Board proceedings, where "practicable," shall be conducted in accordance with the "rules of evidence" applicable in the federal district courts. On its face this amendment regulates the introduction of evidence at Board hearings, without imposing on the Board any particular pre-trial procedures—such as discovery—which do not by any standard constitute rules of evidence. The legislative history of section 10 (b) confirms this. Under the original Act, section 10 (b) provided that "[i]n any such proceeding the rules of evidence

prevailing in courts of law or equity shall not be controlling." This provision was heavily criticized on the ground that it allowed too much incompetent evidence to get into the record of Board hearings. It was solely to meet that criticism that section 10 (b) was amended in 1947. See 93 Cong.Rec. 3529, I Legislative History of the Labor Management Relations Act, 1947, p. 697 (hereafter "Leg. Hist."); House Report No. 245, on H.R. 3020, 80th Cong. 1st Sess. pp. 5, 40-41, 43, I Leg. Hist. 296, 331-332, 334; House Conference Report No. 510, on H.R. 3020, p. 53, 1 Leg.Hist. 557; 93 Cong. Rec. 3529 (Remarks of Rep. Owens, I Leg.Hist. 697; 93 Cong.Rec. 7345) (Remarks of Rep. Lesinski, I Leg.Hist. 910).[5] Moreover the Board has held that the amended section 10 (b) "clearly relates to the introduction of evidence before the Board, and not to pre-trial privilege accorded parties to judicial proceedings." Del E. Webb Construction Co., 95 N.L.R.B. 377 n. 2 (1951).

Second, we believe that the Fifth Circuit erred when it indicated that discovery procedures were recommended by the 1960 Committee on Revision. Although Board Member Jenkins, in a working memorandum dated January 1960 (45 LRRM 94, 101), urged that a discovery procedure be formulated and proposed by the Committee, this plainly was not done. The Committee's proposed modification of Rule 102.30 would have preserved the requirement that good cause be shown and would have provided for [860] the taking of "testimony by deposition upon oral

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[5] For example, in commenting upon the change, Representative Hartley, one of the Act's sponsors, stated that the provision "changes the procedure as to *the introduction of evidence before the Board*. It must now be conducted in accordance with the 'rules of evidence applicable in the district courts * * *'" (emphasis supplied). 93 Cong.Rec. 3529, I Legislative History of the Labor Management Relations Act, 1947, p. 697.



examination or written interrogatories *for use as evidence in the hearing*" (emphasis added), thus preserving the distinction, recognized in the Federal Rules and long applied in Board practice, between depositions taken "for the purpose of discovery" and those taken "for use as evidence in the action." Finally, we think that the Fifth Circuit was mistaken in its view that the Board's rules were modified to incorporate the changes recommended by the Committee on Revision. Rule 102.30 was first promulgated in its present form in 1942, and not a word of substance has been changed since.

Furthermore, even under the Fifth Circuit's interpretation of Rule 102.30, we would sustain the action of the trial examiner. That rule gives the Board discretion to determine whether to allow the adversary litigant to take depositions. In both *Safway* and *Miami Coca Cola supra*, the court stated that whether depositions are permitted for discovery purposes in a particular case depends upon whether in the trial examiner's opinion good cause has been shown. Thus, even if we accepted the Fifth Circuit's position, we could not deny enforcement of the Board's order on the ground that the trial examiner denied the Company's application to take depositions, unless we found that such ruling constituted an abuse of discretion—a condition which has been found to exist only if the denial "is demonstrated to clearly prejudice the appealing party." Electromec Design & Development Co. v. N.L.R.B., 409 F.2d 631, 635 (9th Cir. 1969). See also N.L.R.B. v. Leprino Cheese Co., 73 LRRM 2865 (10th Cir. decided March 31, 1970). As we indicate below, however, no such prejudice was shown here. Indeed, the Fifth Circuit decisions cited by the Company itself indicated that no prejudice was suffered in those cases because those from whom depositions were sought appeared as witnesses at the hearing and were thus made available to cross-examination by the party

seeking discovery. See N.L.R.B. v. Safway Steel Scaffolds Co. of Georgia, 383 F.2d 273, 277 (5th Cir. 1967); and N.L.R.B. v. Miami Coca-Cola Bottling Co., 403 F.2d 994, 996 (5th Cir. 1968). Similarly in this case, the Company's counsel had ample opportunity to cross-examine the Landers at the hearing about the matters on which he wanted to depose them.

No. 75-1661

Supreme Court, U. S.
FILED
JUL 1 1976
MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1975

VALLEY MOLD COMPANY, INC., PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION**

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 31a-34a) is reported at 530 F. 2d 693. The Board's supplemental decision and order (Pet. App. 1a-30a) are reported at 215 NLRB No. 38.

## JURISDICTION

The judgment of the court of appeals was entered on February 17, 1976. The petition for a writ of certiorari was filed on May 14, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether, in administrative proceedings to determine backpay liability, an employer is entitled to take depositions for the purpose of discovery.

## STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), and of the Board's Rules and Regulations are set forth at Pet. App. 35a-36a, 41a-43a, and in the Appendix, *infra*, pp. 1a-3a).

## STATEMENT

On June 24, 1971, the National Labor Relations Board issued a Decision and Order (191 NLRB 498) finding, *inter alia*, that petitioner violated Section 8(a)(3) and (1) of the National Labor Relations Act by laying off seventeen employees for the purpose of discouraging membership in the Union,[1] and by discharging nine employees because of their activities on behalf of the Union. The Board's order required the Company to compensate the laid off employees for any loss they may have suffered by reason of the illegal layoff, and to offer the discharged employees immediate and full reinstatement to their former or substantially equivalent positions and to compensate them for any loss of earnings suffered as a result of the illegal discharge. The Board also enjoined the Company from all forms of unlawful interference with employees' Section 7 rights (191 NLRB at 501-502). On October 26, 1972, the court of appeals enforced the Board's order (467 F. 2d 482).

The Board's Acting Regional Director thereafter issued and served on the Company, pursuant to the Board's regulations (29 C.F.R. 102.52-102.59), a specification of the backpay allegedly due each of the discharged and laid off employees, which showed the gross wages which each

[1]District Lodge No. 13 of the International Association of Machinists and Aerospace Workers, AFL-CIO.



employee would have earned on a calendar quarter basis, his interim earnings from other employment, his expenses, and the resulting net backpay due the employee (Pet. App. 5a; R. 182-194).[2] The specification also stated that a hearing on the allegations in the specification would be held before an Administrative Law Judge on January 29, 1974 (R. 193). The Company answered, with respect to each claimant, that it was "without knowledge or information sufficient to form a belief as to the amounts of net interim earnings * * *" (Pet. App. 5a).

On January 4, 1974, the Company filed with the Regional Director an application to take the depositions of the eight backpay claimants who had been illegally discharged[3] (Pet. App. 6a). The Regional Director denied the application on the ground that the Company had failed to show "good cause" for taking such depositions as required by the Board's Rules and Regulations (29 C.F.R. 102.30; App., *infra*, pp. 1a-3a). Specifically, the Regional Director found that the proposed depositions were "for the purpose of [the Company's] convenience" rather than because of illness or unavailability of the witnesses; that the witnesses that the Company wished to depose all resided within reasonable proximity to the place of the hearing and therefore could be cross-examined in person at the hearing; and that the Company actually was seeking prehearing discovery, against which the Board had a long standing policy (Pet. App. 6a; A. 204).

[2]"R." refers to the joint appendix to the briefs filed in the court below.

[3]Because one of the nine employees who had been illegally discharged was found to have suffered no loss of earnings, backpay was claimed only for eight employees (A. 183).

At the commencement of the hearing before the Administrative Law Judge, the Company reiterated its objection to the denial of its request to take depositions. The Law Judge overruled the Company's objection, noting that all the backpay claimants were present and available for cross-examination (Pet. App. 6a). Each of the eight discharged claimants who was eligible for backpay was called as a witness by the General Counsel and cross-examined by the Company (Pet. App. 7a, 33a). At the completion of the General Counsel's evidence, the Company moved for a continuance to take depositions from all the employers with whom the claimants testified they had sought interim work (Pet. App. 7a; A. 175-176). The Law Judge denied the motion; counsel for the Company thereupon declined to go forward, stating that he felt that he could not adequately defend the Company because he had been denied a reasonable opportunity to present a defense (Pet. App. 7a; R. 174, 176-181).

During the next two months, the Administrative Law Judge twice offered the Company an opportunity to reopen the record for an additional hearing to take evidence from any person allegedly involved in the claimants' efforts to secure interim employment, and stated that subpoenas would be available to insure the attendance of such witnesses. The Law Judge also stated that he would consider recalling the claimants after the Company introduced any evidence it had bearing on the issues (Pet. App. 33a, 8a-9a). On March 27, 1974, the Company moved "under protest" to reopen the record and indicated in an accompanying letter that it would petition the federal district court for injunctive relief (Pet. App. 9a; R. 227-228). On April 2, 1974, the Administrative Law



Judge issued an order reopening the record for an additional hearing to take evidence from any person allegedly involved in the claimants' efforts to secure interim employment (Pet. App. 9a; A. 228).[4]

On April 5, 1974, the Company commenced an action in the United States District Court for the Southern District of Ohio, seeking an injunction to postpone the reopening of the hearing and to require the Administrative Law Judge to permit the taking of depositions (Pet. App. 9a). The Company also filed with the Administrative Law Judge a Motion to Suspend the Hearing Date (Pet. App. 9a; R. 229, 238). The Administrative Law Judge thereafter withdrew the order reopening the record for additional hearing and closed the record, on the ground that the Company was continuing to insist upon the use of depositions in the presentation of its case (Pet. App. 9a, 28a-30a).[5]

On May 13, 1974, the Administrative Law Judge determined that the eight employees who had been illegally discharged were entitled to backpay totalling $39,742.98, plus interest, and that the seventeen employees who had been illegally laid off were entitled to backpay totalling $941.90, plus interest (Pet. App. 25a-26a). The Company thereafter filed exceptions with the Board. The Board affirmed the Law Judge, and ordered the Company to pay the employees the amount of backpay set forth in

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[4]The Administrative Law Judge had denied an earlier motion to reopen the record because that motion, which was essentially identical to the motion made by the Company at the close of the hearing, clearly contemplated the taking of depositions (Pet. App. 8a-9a; R. 222, 225-226).

[5]The Board's subsequent motion to dismiss the district court action was unopposed and was granted.

the Law Judge's order (Pet. App. 1a-3a). The Board rejected the Company's procedural objections on the ground that "[t]he Board's rules provide an adequate procedure to protect [the Company's] rights" (Pet. App. 2a, n. 2).

The court of appeals enforced the Board's order (Pet. App. 31a-34a), reasoning that the Board's rules did not establish a right to take depositions for purposes of prehearing discovery; that the Administrative Law Judge did not abuse his discretion in denying the Company's motion for a continuance to take depositions, since the Company was not prejudiced thereby; and that there was "no merit in the Company's claim of deprivation of due process" (Pet. App. 32a-34a).

## ARGUMENT

1. Petitioner contends (Pet. 13-20) that it was denied due process by the denial of its application to take prehearing depositions of the backpay claimants who had been unlawfuly discharged and by the denial of its motion for a continuance to take prehearing depositions of employers with whom the claimants allegedly had sought interim employment. It is established, however, that the Fifth Amendment does not require that parties to judicial or quasi-judicial proceedings be permitted to take prehearing depositions. *National Labor Relations Board* v. *Interboro Contractors, Inc.*, 432 F.2d 854, 857-858 (C.A. 2), certiorari denied, 402 U.S. 915; *Starr* v. *Commissioner*, 226 F.2d 721, 722 (C.A. 7), certiorari denied, 350 U.S. 993.

2. Contrary to petitioner's further contention (Pet. 21-22), neither the National Labor Relations Act nor the Administrative Procedure Act, 5 U.S.C. 551, *et seq.*, requires that parties to administrative backpay hearings be permitted to take prehearing depositions for the purpose of discovery. It is established that the National Labor



Relations Act does not require the Board to follow discovery procedures set out in the Federal Rules of Civil Procedure, *National Labor Relations Board* v. *Interboro Contractors, Inc., supra*, 432 F.2d at 859, and there is no provision in the Act mandating prehearing discovery, *National Labor Relations Board* v. *Globe Wireless, Ltd.*, 193 F.2d 748, 751 (C.A. 9). It is also established that the Administrative Procedure Act does not confer a right to discovery in administrative proceedings. *Frilette* v. *Kimberlin*, 508 F.2d 205, 208 (C.A. 3), certiorari denied, 421 U.S. 980.

3. The Administrative Law Judge did not abuse his discretion in denying petitioner's motion for prehearing depositions. Board Rule 102.30(a) (29 C.F.R. 102.30(a); App., *infra*, pp. 1a-2a), provides that an Administrative Law Judge may permit prehearing depositions "if in his discretion good cause has been shown." Here, all the claimants were available for cross-examination at the hearing, and the Administrative Law Judge twice offered petitioner the opportunity to reopen the record for the purpose of taking evidence from any person alledgedly involved in the claimants' efforts to secure interim employment, and stated that subpoenas would be available to insure the attendance of such witnesses. Accordingly, petitioner was not prejudiced by its inability to depose these witnesses.

There is no conflict among the circuits on this issue. Although, as petitioner points out, the circuits are in some disagreement as to the appropriate scope of the Law Judge's discretion to find "good cause" to permit depositions,[6] there is no disagreement that refusal to permit

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[6]The Second Circuit and the National Labor Relations Board have held that, under the Board's rules, an Administrative Law Judge may find "good cause" to permit the taking of depositions only when the witness to be deposed is likely to be unavailable at the hearing,

depositions in a backpay proceeding is not an abuse of discretion where, as here, there has been no prejudice. *Electromec Design and Development Company* v. *National Labor Relations Board,* 409 F.2d 631, 635 (C.A. 9); *National Labor Relations Board* v. *Rex Disposables,* 494 F.2d 588, 592 (C.A. 5); *Winn-Dixie Stores, Inc.* v. *National Labor Relations Board,* 413 F.2d 1008, 1010 (C.A. 5).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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*National Labor Relations Board* v. *Interboro Contractors, Inc., supra;* the Fifth Circuit has held that the Law Judge has discretion to find "good cause" so long as depositions are practicable under the circumstances and they are not used to harass or coerce employees. *National Labor Relations Board* v. *Miami Coca-Cola Bottling Company,* 403 F.2d 994, 996. See also *National Labor Relations Board* v. *Safeway Steel Scaffolds Company of Georgia,* 383 F.2d 273, 277 (C.A. 5).

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## APPENDIX

The relevant provisions of the National Labor Relations Boards Rules and Regulations (29 C.F.R. 102.1, *et seq.*) are as follows:

§ 102.30 *Examination of witnesses; depositions.* —Witnesses shall be examined orally under oath, except that for good cause shown after the issuance of a complaint, testimony may be taken by deposition.

(a) Applications to take depositions shall be in writing setting forth the reasons why such depositions should be taken, the name and post office address of the witness, the matters concerning which it is expected the witness will testify, and the time and place proposed for the taking of the deposition, together with the name and address of the person before whom it is desired that the deposition be taken (for the purposes of this section hereinafter referred to as the "officer"). Such application shall be made to the regional director prior to the hearing, and to the administrative law judge during and subsequent to the hearing but before transfer of the case to the Board pursuant to § 102.45 or § 102.50. Such application shall be served upon the regional director or the administrative law judge, as the case may be, and upon all other parties, not less than 7 days (when the deposition is to be taken within the continental United States) and 15 days (if the deposition is to be taken elsewhere) prior to the time when it is desired that the deposition be taken. The regional director or administrative law judge, as the case may be, shall upon receipt of the application, if in his discretion good cause has been shown, make and serve upon the parties an order which will

specify the name of the witness whose deposition is to be taken and the time, the place, and the designation of the officer before whom the witness is to testify, who may or may not be the same officer as that specified in the application. Such order shall be served upon all the other parties by the regional director or upon all parties by the administrative law judge.

(b) Such deposition may be taken before any officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, including any agent of the Board authorized to administer oaths. If the examination is held in a foreign country, it may be taken before any secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States.

(c) At the time and place specified in said order the officer designated to take such deposition shall permit the witness to be examined and cross-examined under oath by all the parties appearing, and his testimony shall be reduced to typewriting by the officer or under his direction. All objections to questions or evidence shall be deemed waived unless made at the examination. The officer shall not have power to rule upon any objections but he shall note them upon the deposition. The testimony shall be subscribed by the witness in the presence of the officer who shall attach his certificate stating that the witness was duly sworn by him, that the deposition is a true record of the testimony and exhibits given by the witness, and that said officer is not of counsel or attorney to any of the parties nor interested in the event of the proceeding or investigation. If the deposition is not signed by the



witness because he is ill, dead, cannot be found, or refuses to sign it, such fact shall be included in the certificate of the officer and the deposition may then be used as fully as though signed. The officer shall immediately deliver an original and two copies of said transcript, together with his certificate, in person or by registered mail to the regional director or the administrative law judge, care of the chief administrative law judge in Washington, D.C., or associate chief administrative law judge, San Francisco, Calif., as the case may be.

(d) The administrative law judge shall rule upon the admissibility of the deposition or any part thereof.

(e) All errors or irregularities in compliance with the provisions of this section shall be deemed waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is or, with due diligence, might have been ascertained.

(f) If the parties so stipulate in writing, depositions may be taken before any person at any time or place, upon any notice and in any manner, and when so taken may be used like other depositions.